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IN THE

Supreme Court of the United States

ROCIO SANCHEZ, OLGA CASTRO, MYRNA MARTINEZ, KAREN BJORLAND, CHERYL MACLYMAN, AND RHONDA KERN,
Petitioners,

v.

COUNTY OF SAN DIEGO, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC ALAN ISAACSON
BONNY E. SWEENEY
AMBER L. ECK
LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
655 West Broadway, Suite 1900
San Diego, California 92101
(619) 231-1058

WALTER DELLINGER
(*Counsel of Record*)
PAMELA HARRIS
PAMMELA QUINN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

DAVID BLAIR-LOY
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
450 B Street, Suite 1420
San Diego, California 92101
(619) 232-2121

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

In 1971, this Court held in *Wyman v. James*, 400 U.S. 309, 317, that a state official's entry into a welfare recipient's home does not constitute a "search" subject to Fourth Amendment standards because it occurs outside the "traditional criminal law context." Subsequent decisions of the Court have called that holding into very serious question, but have not overruled it outright. The result is a recognized circuit conflict over whether home entries in the social-services context are "searches" for Fourth Amendment purposes and, if so, what Fourth Amendment standard applies. The circuits also are divided on the more specific question of whether the Fourth Amendment permits the government to require that all welfare applicants submit to suspicionless home entries as a condition of eligibility.

In order to resolve these conflicts, petitioners ask this Court to answer the following question presented:

Are suspicionless searches like those required by San Diego County as a condition of welfare eligibility, in which pursuant to a program developed by the district attorney's office, county fraud investigators from the district attorney's office enter all applicants' homes and look through their most intimate areas, a violation of the applicants' Fourth Amendment rights?

PARTIES TO THE PROCEEDING

Petitioners are Rocio Sanchez, Olga Castro, Myrna Martinez, Karen Bjorland, Cheryl Maclyman, and Rhonda Kern, applicants for public assistance subject to San Diego County's "Project 100%" program requiring home entries by agents of the County District Attorney's office as a condition of welfare eligibility, plaintiffs-appellants below.*

Respondents are the County of San Diego; San Diego County Board of Supervisors; San Diego County Department of Health and Human Services; Jean Shepard, Director of the San Diego County Health and Human Services Agency, in her official capacity; San Diego Office of District Attorney; and Bonnie Dumanis, District Attorney of the County of San Diego, in her official capacity, defendants-appellees below.**

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* A further plaintiff, "Aurora," whose name appears in the Ninth Circuit caption did not participate in the litigation before the Ninth Circuit, and is not included among the petitioners to this Court.

** Both Bonnie Dumanis and Jean Shepard are substituted in place of the prior officeholders who were sued in their official capacities. *See* Fed. R. App. P. 43(c)(2).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Rocio Sanchez, Olga Castro, Myrna Martinez, Karen Bjorland, Cheryl Maclyman, and Rhonda Kern respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' decision is reported at 464 F.3d 916 and is reprinted in the Appendix to the Petition ("App.") at 1a-51a. The court of appeals' order denying en banc rehearing is reported at 483 F.3d 965 and is reprinted at App. 111a-119a. The district court's March 7, 2003, order granting summary judgment, which the Ninth Circuit reviewed and affirmed, appears in the appendix hereto at App. 52a-90a.[1]

JURISDICTION

The court of appeals issued its decision on September 19, 2006. App. 1a. A timely petition for rehearing en banc was denied on April 16, 2007. App. 111a. This Court granted petitioners' request for an extension of time to petition for certiorari to and including August 15, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[1] A subsequent opinion that resolved certain matters not at issue here was entered on May 12, 2003, and is available electronically at 2003 U.S. Dist. LEXIS 27351 (S.D. Cal. May 12, 2003). It appears in the appendix hereto at App. 97a-110a. A settlement of all remaining issues was approved on December 12, 2003, by an order entered on December 16, 2003, App. 91a-96a, clearing the way for an appealable final judgment dated December 31, 2003, and entered January 5, 2004, App. 120a-125a.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

San Diego County's "Project 100%" requires every welfare applicant, including those for whom there is no basis for suspecting ineligibility or fraud—and even those able to prove eligibility through other, less intrusive means—to submit to a "home visit" from the County District Attorney's Public Assistance Fraud Division. This visit entails a required home entry and can involve detailed inspection of personal areas of the home, including bedrooms and bathrooms.

The express purpose of the program is to uncover evidence of ineligibility or fraud. The County also anticipates that the program may uncover evidence that will lead to criminal prosecution of applicants for past welfare fraud or for crimes other than welfare fraud. Failure to comply with the required "home visit" necessarily results in denial of welfare benefits.

The Ninth Circuit invoked this Court's decision in *Wyman v. James*, 400 U.S. 309 (1971), to uphold the program. It did so despite recognizing explicitly that intervening decisions by this Court call into question the continuing validity of *Wyman*'s broad holding that the Fourth Amendment does not apply at all under these

circumstances. It also did so over the "trenchant" dissenting opinion of a member of the panel, *see* App. 119a (Kozinski, J., dissenting from denial of rehearing en banc) (describing Judge Fisher's panel dissent). The divisive nature of the issue prompted further dissent from eight of the active judges on the court of appeals below on the question whether rehearing en banc was warranted. App. 112a-118a.

The decision below deepens a long-standing conflict among the courts of appeals on the status of *Wyman* and the Fourth Amendment standard applicable to home entries in the social-services context. It also puts the Ninth Circuit in direct conflict with the Seventh on the constitutionality of programs like the one at issue here. Review by this Court is warranted to resolve the uncertainty relating to these important constitutional questions.

A. Factual Background

San Diego's Project 100% was conceived in 1997 by the County District Attorney's Office, with the stated aim of "redoubling" its efforts to combat welfare fraud and assure "program integrity."[2] In fact, the program was launched at a time when the number of welfare agency referrals to the District Attorney's office requesting *for-cause* investigations—*i.e.*, in cases where there was some reason to suspect ineligibility—was sharply declining.[3] As the County's welfare case load more than halved from 1994 to 1999, forcing a 37% reduction in County welfare staff, and

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[2] *See, e.g.*, Excerpts of the Record ("ER") 86 Ex. 48, at 14 (Answer ¶64); ER 85 Ex. 1, at 36, 115 (Apr. 22, 2002 Dep. Test. of L. Aragon, Deputy Dist. Attorney, Pub. Assistance Fraud Division Chief ("Aragon Dep.")); ER 85 Ex. 18, at 60 (Apr. 18, 2002 Dep. Test. of J. Zinser, Deputy Dir. for Strategy & Planning Div., Health & Human Servs. Agency).

[3] ER 86 Ex. 38 (Mar. 5, 1997 Mem. from L. Aragon to G. Thompson, Asst. Dist. Attorney).

as "for-cause" referrals to the District Attorney's office for investigations of suspected fraud dropped, the District Attorney avoided staffing cuts by assigning its Fraud Investigators the new task of investigating *every welfare applicant* by looking through their homes on Project 100% home visit "walk-throughs."[4]

Pursuant to the Project 100% program, every welfare applicant is informed that a mandatory "home visit" must be completed before he or she will be approved for aid. App. 3a-4a. The applicant is not told when this "home visit" will occur, although generally it takes place during regular business hours within 10 days of the application. *Id.* at 3a. The home visits are conducted not by social workers, but by "investigators from the Public Assistance Fraud Division of the D.A.'s office, who are sworn peace officers with badges and photo identification." *Id.*

Once they arrive at the applicant's home, the District Attorney's agents interview the applicant and then conduct a "walk-through" of the home. App. 4a. During this walk-through, "[t]he investigator will also ask the applicant to view the interior of closets and cabinets." *Id.*[5] Failure to

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[4] *See* ER 85 Ex. 16, at 16-17 (Jan. 30, 2002 Dep. Test. of J. Vukotich, Asst. Deputy Dir., Health & Human Servs. Agency); ER 85 Ex. 21, at 3226 (Mar. 14, 2000 Health & Human Servs. Agency Mem. noting decline in County welfare staff as caseloads dropped, but that "[i]n contrast, the District Attorney's investigation staff has not changed during this time period").

[5] The investigators look through bedroom closets and dresser drawers. *See, e.g.*, ER 85 Ex. 7, at 53-54 (Apr. 29, 2002 Dep. Test. of J. Duvall, Public Assistance Fraud Investigator, Office of Dist. Attorney ("Duvall Dep.")); ER 85 Ex. 9, at 55-56 (Dec. 12, 2001 Dep. Test. of J. Hale, Supervisor of Dep't of Soc. Servs. Fraud Bureau); ER 85 Ex. 2, at 69-71 (Feb. 14, 2002 Dep. Test. of E. Bogard, Public Assistance Fraud Investigator, Office of Dist. Attorney ("Bogard Dep.")); ER 85 Ex. 7, at 52-53 (Duvall Dep.). They inspect bathrooms and medicine cabinets, count toothbrushes, and look for men's bath products. ER 85 Ex. 8, at 82-83 (Apr. 3, 2002 Dep. Test. of E Gonzalez, Fmr. Fraud Prevention

submit to the "home visit" (including the "walk-through") automatically results in denial of the application for public assistance. *Id.* at 3a-4a.

The express purpose of these investigations is to uncover evidence of fraud in connection with the welfare application. *Id.* In addition, should they find it, "the investigators are required to report evidence of potential criminal wrongdoing for further investigation and prosecution." *Id.* at 4a. This extends beyond the application that is the subject of the home entry: investigators will refer for prosecution evidence of other criminal behavior. App. 4a n.3. The D.A.'s Public Assistance Fraud Division chief testified that his investigators are trained *not* to give rehabilitative counseling or advice to applicants, and that their "focus is highly limited" to legal compliance:

> [I]t is not our expectation that they are going to go outside of that. And I'm trying to envision what a rehabilitation would be under those circumstances. Get off the couch. Get a job. I don't know. So, no . . . —so I—no. I don't envision rehabilitation as a part of that. I can't even imagine what that would look like.

ER 85 Ex. 1, at 170-71 (Aragon Dep.).

Supervisor ("Gonzalez Dep.")); ER 85 Ex. 12, at 46 (Aug. 21, 2001 Dep. Test. of Pet'r Myrna Martinez ("Martinez Dep.")). They look through children's bedrooms and inspect the children's belongings, including their clothing and even their dirty laundry. ER 85 Ex. 8, at 84 (Gonzalez Dep.); ER 85 Ex. 2, at 88-90 (Bogard Dep.); ER 85 Ex. 14, at 51 (Apr. 25, 2002 Dep. Test. of F. Reid, Supervising Investigator, Office of Dist. Attorney ("Reid Dep.")). They also request closer inspection of potential evidence, such as bank statements or other personal papers they might spot on a desk. ER 85 Ex. 5, at 77 (May 2, 2002 Dep. Test. of L. Crosby, Training Supervisor, Pub. Assistance Fraud Investigation); ER 85 Ex. 7, at 21 (Duvall Dep.).

When the investigator conducts the home inspection, no part of the home is off-limits, and no official policy or protocol limits or guides the discretion of investigators in deciding where to search inside the home or what items to inspect.[6] Not surprisingly, subjects of these home investigations testified that they were "frightened," "upset and degraded," and even reduced to tears by the District Attorney's "humiliating and embarrassing" intrusions into their homes.[7]

B. Proceedings Below

1. Petitioners, applicants for public assistance in San Diego County, brought the instant case, a facial challenge to Project 100% as a violation of the Fourth Amendment's guarantee against unreasonable searches.[8] The district court's jurisdiction was invoked under 28 U.S.C. § 1331. After certifying a class, the district court granted the defendants' motion for summary judgment. App. 52a-90a.

2. a. A divided panel of the Ninth Circuit affirmed, App. 1a-51a, relying almost exclusively on *Wyman v. James*, 400 U.S. 309, a 1971 decision of this Court. In *Wyman*, the Court held that a home visit by a government social worker to the home of a government aid recipient did not constitute a "search" for Fourth Amendment purposes. Because the home visit did not arise "in the traditional criminal law context," the Court reasoned, it could not "be equated with a search" implicating the Fourth Amendment. *Id.* at 317. And even assuming the home visit could be treated as a search,

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[6] ER 85 Ex. 14, at 65 (Reid Dep.); ER 85 Ex. 7, at 19 (Duvall Dep.).

[7] ER 85 Ex. 3, at 43-44 (Aug. 21, 2001 Dep. Test. of Pet'r Karen Bjorland); ER 85 Ex. 12, at 40, 43-46 (Martinez Dep.).

[8] Although petitioners sought relief under a variety of additional state and federal theories, this Court's review is sought only with respect to the controlling federal constitutional law issues.

the Court continued, it was valid under the Fourth Amendment because it was not unreasonable. *Id.*

Applying *Wyman*, the panel majority held, first, that no Fourth Amendment "search" occurs when, as a condition of welfare eligibility, agents of the District Attorney enter and walk through a private home (including bedrooms and bathrooms), searching for evi 'ence of welfare ineligibility or welfare fraud. As a result, the Fourth Amendment simply is not implicated by the Project 100% home entries and walk-throughs. App. 6a-10a.

In the alternative, the panel went on to hold—again relying on *Wyman*—that even if the home entries could be characterized as "searches," such searches would be "reasonable" as a matter of law under the Fourth Amendment. App. 11a-21a. The majority explained:

> [B]ecause the Project 100% visits serve an important governmental interest, are not criminal investigations, occur with advance notice and the applicant's consent, and alleviate the serious administrative difficulties associated with welfare eligibility verification, we hold that the home visits are reasonable under the Supreme Court's decision in *Wyman*.

App 15a.

b. Judge Fisher dissented, unable to "agree with the majority's conclusion" that *Wyman* "'directly controls' our resolution of this case." App. 28a. Judge Fisher focused on significant distinctions between Project 100% and the home visits approved in *Wyman*:

> *Wyman* involved a primarily *rehabilitative* home visit by a social assistance caseworker . . . . That is a far cry from the program carried out by the County of San

> Diego, whose Project 100% home visits entail a law enforcement agent—trained *not* to give advice to welfare applicants—walking through the applicant's home in search of physical evidence of ineligibility that could lead to criminal prosecution either for welfare fraud or other crimes unrelated to the welfare application.

Id.

According to Judge Fisher, *Wyman* neither compelled nor warranted either of the majority's holdings: that walk-throughs of homes by agents of the District Attorney are not Fourth Amendment "searches," or that even if they are, Project 100% would be "reasonable" under the Fourth Amendment. App. 28a-51a.

3. Petitioners filed a motion for rehearing en banc. App. 111a. The motion was denied, but only over public dissent by eight of the Ninth Circuit's active judges. Judge Kozinski dissented "for the reasons expressed in Judge Fisher's trenchant panel dissent." App. 119a. Judge Pregerson, writing for himself and six other judges, would have held that *Wyman* does not govern petitioners' challenge to Project 100%:

> The majority opinion clings to *Wyman v. James*, 400 U.S. 309 (1971), asserting that it directly controls this case. This is unsupportable for three reasons. First, as clearly outlined in Judge Fisher's dissent, the program upheld in *Wyman* was significantly different in scope and goal from San Diego's program. Second, allowing *Wyman* to constrict the bounds of our Fourth Amendment jurisprudence ignores over thirty-five years of intervening law. Third, allowing this opinion to stand is an assault on

> our country's poor as we require them to give up their rights of privacy in exchange for essential public assistance.

App. 112a-113a.

REASONS FOR GRANTING THE PETITION

As recognized by both the panel majority and dissenting judges below, the holding of this Court's 1971 decision in *Wyman v. James* has been called into serious question by subsequent decisions of the Court. As a result, the circuit courts are divided as to whether home entries in the social-services context constitute "searches" subject to the Fourth Amendment and, if so, what Fourth Amendment standard governs their constitutionality. The lower courts also are in conflict on the narrower question presented here: whether programs like San Diego's Project 100%, which condition welfare eligibility on submission to suspicionless home entries by fraud investigators, are permissible under the Fourth Amendment.

Because the conflict in the lower courts is the product of the uncertain status of this Court's own precedent, it is most unlikely to resolve itself without the Court's intervention. This Court should grant certiorari to clarify the status of *Wyman* and, at a minimum, to confirm that *Wyman's* analysis of rehabilitative home-visits by social workers has no application where, as here, agents of the District Attorney's office with no rehabilitative agenda search the most intimate areas of a person's home.

I. RECOGNIZED TENSION IN THIS COURT'S JURISPRUDENCE HAS PRODUCED A CIRCUIT CONFLICT OVER THE FOURTH AMENDMENT STATUS OF HOME ENTRIES RELATED TO SOCIAL-SERVICES PROGRAMS.

A. It Is Not Clear From This Court's Decisions Whether *Wyman* Is Still Good Law.

As even the panel majority below recognized, App. 11a n.8, the continuing validity of *Wyman v. James*, 400 U.S. 309 (1971), on which it rested its decision, has been called into serious question by subsequent decisions of the Court. That question, as well as the lower-court divisions it has produced, is likely to persist unless and until this Court directly addresses the status of *Wyman*.

1. In 1971, this Court considered in *Wyman* whether the government could require that beneficiaries of the Aid to Families with Dependent Children ("AFDC") program submit to home visits by caseworkers or risk termination of benefits. 400 U.S. at 310. The Court concluded, first, that the AFDC home visits did not constitute "searches" for Fourth Amendment purposes. Because they did not arise "in the traditional criminal law context," the Court reasoned, the home visits could not "be equated with a search" implicating the Fourth Amendment. *See id.* at 317.

The Court went on to say, in what amounted to dicta, that even if the AFDC home visits could be considered "searches," they would be permissible under the Fourth Amendment because they were not unreasonable. The Court relied for this conclusion on a close analysis of eleven factors implicated by the facts of the case before it.[9] It was careful

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[9] The factors the Court considered relevant to the reasonableness of the AFDC home visits were: 1) the public interest in protecting the needs of the child who is the ultimate beneficiary of the welfare assistance; 2) the state interest in ensuring that assistance only reaches its intended

not to suggest that "termination of benefits upon refusal of a home visit is to be upheld against constitutional challenge under all conceivable circumstances." *Id.* at 326.

2. In the more than 35 years since *Wyman* was decided, this Court has decided a number of cases that are difficult, if not impossible, to square with *Wyman*'s holding that an AFDC home visit does not constitute a "search" under the Fourth Amendment. First, and most fundamentally, when *Wyman* was decided in 1971, it remained uncertain whether the Fourth Amendment "regulate[d] only searches and seizures carried out by law enforcement officers" engaged in criminal law-enforcement activities, or whether it extended as well to searches conducted by other state officials, as in the school and social-services contexts. *New Jersey v. T.L.O.*, 469 U.S. 325, 334-35 (1985) (search of students' belongings by school officials). The Court answered that question in 1985, in *New Jersey v. T.L.O.*, holding—contrary to the first premise of *Wyman*—that government inspections that occur outside the traditional criminal context are indeed "searches" subject to Fourth Amendment constraints. *Id.*; *cf. Wyman*, 400 U.S. at 317 (concluding that the home visits in question

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beneficiaries; 3) the public's interest and expectation in "know[ing] how [its] charitable funds are utilized and put to work"; 4) the interest in rehabilitation; 5) the fact that home visits are at "the heart of welfare administration"; 6) the relatively non-intrusive nature of the search at issue; 7) the fact that nothing in the record "supports an inference that the desired home visit [at issue] had as its purpose the obtaining of information as to criminal activity"; 8) the inability of the state to verify all of the information it sought solely through other, less-intrusive means; 9) the visit is not one by police or uniformed authority but instead is conducted by a caseworker whose "primary objective is, or should be, the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility"; 10) the visit is "not a criminal investigation, does not equate with a criminal investigation," and "is not in aid of any criminal proceeding"; and 11) "the warrant procedure . . . [has] seriously objectionable features in the welfare context" compared to the home visit at issue, because it would, *inter alia*, justify entry by force and be unlimited in what hours it could be utilized. *Wyman*, 400 U.S. at 318-23.

"simply could not be equated with a search in the traditional criminal law context").

New Jersey v. T.L.O. was the first of what has become known as the "special needs" line of cases. In all of those cases, the Court has reaffirmed the same principle that it appeared to disavow in *Wyman*: that governmental intrusions into personal privacy are "searches" that implicate the Fourth Amendment whether or not they arise in the criminal context. *See, e.g., Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (school drug-testing of students); *Illinois v. Lidster*, 540 U.S. 419 (2004) (vehicle checkpoint seeking citizen assistance). Because those inspections advance a "special need" separate from criminal law enforcement, they are subject to a different Fourth Amendment standard under this Court's holdings. Rather than applying the Fourth Amendment warrant requirement, the Court has assessed the "reasonableness" of such programs by the now-familiar balancing of the government's interest in and need for the program against its intrusiveness. *See T.L.O.*, 469 U.S. at 337; *Vernonia*, 515 U.S. at 652-53. But the fact that the inspections are not part of a criminal law-enforcement effort does not mean that they are not "searches" at all, entirely unregulated by the Fourth Amendment—as this Court appears to have held in *Wyman*, and as the Ninth Circuit held below, in reliance on that 1971 precedent.

Second, in the decades since *Wyman* was decided, this Court has decided a number of cases establishing the special sanctity of the home under the Fourth Amendment, and emphasizing that governmental intrusion into the home "is the chief evil" against which the Fourth Amendment protects. *Payton v. New York*, 445 U.S. 573, 585 (1980) (Fourth Amendment requires warrant for home arrest, though not for arrest in public); *see also Wilson v. Arkansas*, 514 U.S. 927, 927 (1995) (Fourth Amendment requires police to "knock and announce" before they enter private

home). Most recently, in *Kyllo v. United States*, the Court explained that the Fourth Amendment "draw[s] 'a firm line at the entrance to the house'"—and that any nonconsensual governmental entry of a private home is therefore a "search" subject to Fourth Amendment restrictions. 533 U.S. 27, 40 (2001) (quoting *Payton*, 445 U.S. at 590). In *Kyllo* itself, the Court applied that principle to hold that even use of a thermal-imaging device aimed at a private home from a public street constituted a "search" under the Fourth Amendment. It would appear to follow, *a fortiori*, that an actual physical entry into a home by a governmental official easily would meet the threshold for a Fourth Amendment "search."

The effort of the court below to reconcile *Wyman* with this more modern precedent only highlights how irreconcilable the two really are. The Ninth Circuit majority reasoned that *Kyllo* is distinguishable from the home entry at issue here because it "involved a classic criminal law enforcement investigation." App. 18a n.14. But that purported distinction runs head-on into the *T.L.O.* line of "special needs" cases, which clearly establishes that a governmental inspection need *not* occur as part of a "classic criminal law enforcement investigation" in order to constitute a "search" under the Fourth Amendment.[10] In short, *Wyman*'s first and principal holding—that a governmental entry into a private home that occurs in the social-services context, rather than the criminal context, is not a "search" regulated by the Fourth Amendment—has been undermined badly, if not completely superseded, by subsequent decisions of this Court.

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[10] It is also difficult to reconcile with the facts of this case, in which agents of the County prosecutor enter private homes with no rehabilitative purpose, but with the expectation that evidence of criminal behavior may be uncovered—a search that very much resembles a "classic criminal law enforcement" inspection.

3. *Wyman*'s discussion of the "reasonableness" of the AFDC home visits under the Fourth Amendment—relying on an analysis of eleven case-specific factors, *see supra* n.9—also has been superseded by this Court's subsequent precedent. As discussed above, when *Wyman* was decided, this Court had yet to articulate the "special needs" balancing test that now generally governs searches undertaken outside the criminal context, and calls for a weighing of the governmental interest and the need for the program in question against the degree of intrusion into individual privacy interests. *See, e.g.*, *Chandler v. Miller*, 520 U.S. 305 (1997) (drug testing of candidates for state office); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoints); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (search of a probationer's home as condition of parole). The application of the "special needs" balancing test in such cases stands in sharp contrast to the unfocused analysis of eleven different case-specific factors undertaken by the *Wyman* Court.

B. Confusion Over The Status Of *Wyman* Has Produced A Conflict In The Courts Of Appeals.

1. Given the tensions in this Court's case law, it is perhaps not surprising that the lower courts are in conflict as to the proper Fourth Amendment treatment of home entries by government officials in the social-services context. As the Fifth Circuit recognized in *Roe v. Texas Department of Protective & Regulatory Services*, 299 F.3d 395, 401 & n.4 (2002), "[s]electing the applicable test for a social worker's investigative home visit . . . [is] an issue over which other courts of appeals have divided."

On one side of the divide is the Ninth Circuit in the decision below. As discussed above, the panel majority concluded that *Wyman* continues to govern this area in full, and thus held that home entries and walk-throughs by agents of the district attorneys office under Project 100% do not

constitute "searches" that implicate the Fourth Amendment at all. App. 2a, 8a-10a.

Several other circuits—the Third, Fourth, Seventh, Tenth, and Eleventh—have held to the contrary, treating home entries by government agents as Fourth Amendment "searches" even when they occur in the social-services context. Those courts have been required to narrow *Wyman* to its facts or otherwise distinguish away the precedent from this Court most directly on point. *See Good v. Dauphin County Soc. Servs. for Children & Youth*, 891 F.2d 1087 (3d Cir. 1989) (Fourth Amendment applies to social workers entering homes to investigate allegations of child abuse); *S.L. v. Whitburn*, 67 F.3d 1299 (7th Cir. 1995) (reading *Wyman* as case in which Fourth Amendment applies, but is not violated because consent rendered search permissible, and applying same analysis to similar facts); *Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003) (Fourth Amendment applies to social workers entering homes to investigate allegations of child abuse); *Lenz v. Winburn*, 51 F.3d 1540 (11th Cir. 1995) (applying Fourth Amendment to social worker's home entry but finding no violation); *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993) (Fourth Amendment applies to home entry to investigate fitness of foster parent). In fact, even the Ninth Circuit, in a decision predating the decision below, has held that Fourth Amendment standards regulate home entries by social workers investigating the welfare of a child. *See Calabretta v. Floyd*, 189 F.3d 808 (1999).

The confusion does not end there. Among the majority of circuits holding that social-services home entries do constitute "searches" under the Fourth Amendment, there is an additional divide as to precisely what Fourth Amendment standard should govern. Several of those circuits continue to apply the traditional warrant requirement of the Fourth Amendment to home searches conducted by government

social workers. *See Roska*, 328 F.3d at 1242 (Tenth Circuit) ("no special need . . . renders the warrant requirement impracticable when social workers *enter a home*"); *Good*, 891 F.2d at 1094 (Third Circuit) (rejecting argument that exception to warrant requirement applies to social workers entering homes to investigate charges of child abuse); *see also Calabretta*, 189 F.3d at 817 (Ninth Circuit) (where "sanctity of the home is involved," special needs exception does not apply and warrant is required before social worker may enter).

The Fourth Circuit, on the other hand, has relied on *Wyman* to hold that the "special needs" balancing test, rather than the warrant requirement, should apply to home entries by social workers investigating the fitness of foster parents. *See Wildauer*, 993 F.2d at 372. Though for the Fourth Circuit—unlike the panel below—*Wyman* does not compel the conclusion that a social-services home entry is not a "search," it does affect the applicable Fourth Amendment standard: "[I]nvestigative home visits by social workers are not subject to the same scrutiny as searches in the criminal context." *Id.* (citing *Wyman*, 400 U.S. at 318).[11]

In sum, the federal circuits—driven largely by uncertainty over the status and proper reading of *Wyman*—are deeply and persistently divided over the proper analysis of social-services home entries under the Fourth Amendment. That division is most unlikely to cure itself without this Court's guidance.

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[11] Of course, the facts of this case—which involve a program designed by the district attorney's office to subject all applicants to suspicionless searches of their homes as a condition of welfare eligibility, with the expectation that such searches might uncover evidence that will lead to criminal prosecutions—argue against application of the "special needs" balancing test. *Cf. Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (refusing to apply "special needs" test to program with significant law-enforcement involvement and purpose); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (same).

2. The decision below also creates a circuit conflict on the narrower question presented: whether the Fourth Amendment permits systematic, mandatory inspections of the homes of all welfare applicants. The Ninth Circuit, again relying on *Wyman*, held that such inspections are consistent with the Fourth Amendment. But the Seventh Circuit, in *S.L. v. Whitburn*, 67 F.3d 1299 (1995), has held to the contrary.

In *Whitburn*, the Seventh Circuit assessed the constitutionality of a program in which home inspections to verify food stamp eligibility occurred in cases where the application could not be verified through other, less-intrusive means. Applying *Wyman*, the court upheld the program, but only on the ground that the home inspections were not mandatory, in that "the applicant's refusal to consent to the home visit is not a criminal act, and benefits are not denied or cut off because the applicant has refused to allow the home visit." 67 F.3d at 1307. Both the Wisconsin program at issue in *Whitburn* and the home visit in *Wyman* are, in the view of the Seventh Circuit, "unexceptional application[s] of the principle that the Fourth Amendment's 'prohibition does not apply . . . to situations in which voluntary consent has been obtained." *Id.* (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990)).

That principle does not apply here. San Diego not only requires home inspections in the case of *every* welfare applicant, but directly links benefits to an applicant's consent to the search, denying benefits automatically when an applicant refuses to allow the search. Indeed, benefits are denied even if the applicant could verify eligibility in some other way. Such a program would not be permissible under the Seventh Circuit's decision in *Whitburn*.[12]

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[12] The Minnesota federal district court also has invalidated a welfare home-visit program under the Fourth Amendment, using the same

C. This Court Should Clarify That *Wyman* Does Not Permit The Kind Of Search Conducted Here.

As shown above, the Court's intervention is required to clarify whether and in what form *Wyman* survives intervening decisions by this Court. This case presents the perfect opportunity for the Court to clarify the scope of *Wyman*—which under no possible reading could justify the searches at issue here.

First, even assuming *arguendo* that *Wyman* has continued application in the narrow context of rehabilitative home visits by social workers, this is not such a case. Unlike *Wyman*, this case does not involve in-home counseling by a social worker at a kitchen table or in the living room, but careful inspection of the home—from top to bottom—by an agent of the County prosecutor who is *prohibited* from giving helpful advice or counseling, and who is *looking for evidence* of ineligibility and fraud, despite the absence of any individualized suspicion. As Judge Fisher argued in dissent from the decision below, an in-home interview by a social-assistance caseworker, under regulations that flatly prohibit "snooping in the home," *Wyman*, 400 U.S. at 321, is a far cry from an inspection by the District Attorney's investigator, who goes through closets, dresser drawers, and medicine cabinets. App. 37a (Fisher, J., dissenting); *see also* App. 118a (Pregerson, J., dissenting from denial of rehearing en banc).

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reasoning as the Seventh Circuit in *Whitburn*. In *Reyes v. Edmunds*, 472 F. Supp. 1218 (D. Minn. 1979), the court considered a program that, like Project 100%, made home entries a condition of eligibility for welfare benefits—though, unlike Project 100%, only where there had been a tip or other information calling into question a recipient's eligibility. The court held that *Wyman* did not govern where home entries were made by fraud investigators focused on criminal fraud, rather than social workers with a rehabilitative mission, and ruled even this narrower home-entry program unconstitutional. *Reyes*, 472 F. Supp. at 1224-26.

Second, and significantly, it is difficult to imagine a more coercive situation than the one created by Project 100%. The home visit is mandatory: the applicant is told that refusal to submit to the search will result in an automatic denial of the application for assistance. If this Court were to hold that *Wyman* remains governing law, then it also should confirm the view of several lower courts that *Wyman* is properly read as applying only when a social-services home entry reasonably can be construed as "consensual," *see, e.g.*, *Whitburn*, 67 F.3d at 1307; *Calabretta*, 189 F.3d at 816—decidedly not the case when assent is a condition of receiving subsistence welfare benefits. *See* App. 116a-117a (Pregerson, J., dissenting from denial of rehearing en banc) (stating that "there can be no true consent here," where applicants "are not given notice of when the visit will occur; they are not informed of their right to withhold consent; they are told the visit is mandatory; and they are aware of the severe consequences of refusing the search").

Nor is there any reason to expand *Wyman* to cover this case. Nothing indicates that there is a serious welfare-fraud problem that would justify the searches at issue here. On the contrary, the number of "for-cause" referrals was falling in the time period just before Project 100%'s inception. *See supra* n.3. And in any event, there is no indication that searches like those required by Project 100% actually would identify or deter fraud, even if it were a serious problem. Experience shows that computer-matching systems are both more likely to uncover fraud and far less intrusive on personal privacy. *See* Amy Mulzer, Note, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 Colum. Hum. Rts. L. Rev. 663, 669-70 (2005). And mandatory home visits make no sense as a measure to combat fraud when applicants are denied benefits for refusing home

inspections even if they can prove the veracity of all the facts on their application in some other manner.[13]

Finally, the Court should use this opportunity to articulate a limiting principle that would prevent the expansion of *Wyman* to reach a far broader category of intrusive home searches. As one of the dissenting judges below noted:

> The government is a provider of countless benefits and services, many of which require verification of eligibility—such as disability benefits, Medicare and Medicaid benefits, veterans benefits, student financial aid grants and lunch subsidies for school students. If the majority is correct that a person's expectation of privacy in the home is reduced any time he or she has a relationship with the state that requires an eligibility determination, then there seems little to prevent the government from implementing a home visit program similar to Project 100% with respect to these beneficiaries as well.

App. 46a-47a n.12 (Fisher, J., dissenting). By the same token, the reading of *Wyman* endorsed by the panel below would permit agents of the Internal Revenue Service to enter and search the home of any person claiming a dependent as a tax deduction, in order to verify the claim. *Wyman* itself did not contemplate so intrusive a search, *cf. Wyman*, 400 U.S. at 324 (comparing AFDC home visit to request by IRS that

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[13] It may be that Project 100% is most effective not as a means of combating fraud, but as a deterrent to eligible applicants. It is common for verification procedures to be implemented with the goal or effect of reducing total expenditures associated with the program, by way of "informal rationing": When procedures become burdensome enough, only the neediest will be willing to submit to them. *See* Mulzer, *supra*, at 679-80.

"taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted")—but until this Court clarifies the more limited scope of *Wyman*, the lower courts will continue to misread that decision in a way that would authorize a broad range of governmental intrusions into the home.

II. THIS CASE PRESENTS AN IDEAL VEHICLE FOR ADDRESSING THE IMPORTANT CONSTITUTIONAL QUESTION AT STAKE.

This case provides the Court with an unusually good vehicle for resolving the conflict in the lower courts over the Fourth Amendment status of home entries by government officials in the social-services context. As many of the cases cited above illustrate, the issue presented by this case most commonly arises in connection with other legal issues that also must be addressed in connection with the Fourth Amendment question. For example, the issue frequently arises as the first of several questions to be resolved as part of a qualified immunity defense to a § 1983 claim. *See, e.g.*, *Roska v. Peterson*, 328 F.3d at 1251 (deciding several issues, including Fourth Amendment issue, to conclude qualified immunity defense was valid); *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d at 395 (same); *Wildauer v. Frederick County*, 993 F.2d at 374 (same). It may also arise in the context of a criminal trial, on a motion to exclude evidence discovered during an allegedly unconstitutional home visit.

This case, however, cleanly presents the single issue of whether searches like those required by Project 100% violate the Fourth Amendment. Because it arises from a facial challenge to San Diego's Project 100%, it involves no procedural complications or other issues that might complicate review. The Court should take this opportunity to resolve the status of *Wyman* and the conflict in the lower courts over the Fourth Amendment's application to home

searches conducted by government officials in the social-services context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIC ALAN ISAACSON
BONNY E. SWEENEY
AMBER L. ECK
LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
655 West Broadway, Suite 1900
San Diego, California 92101
(619) 231-1058

WALTER DELLINGER
(*Counsel of Record*)
PAMELA HARRIS
PAMMELA QUINN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

DAVID BLAIR-LOY
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
450 B Street, Suite 1420
San Diego, California 92138
(619) 232-2121

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Attorneys for Petitioners

Dated: August 15, 2007

APPENDIX

APPENDIX A

Rocio SANCHEZ; Olga Castro; Myrna Martinez; Karen Bjorland; Cheryl Maclyman; Rhonda Kern, Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; San Diego County Board of Supervisors; San Diego County Department of Health and Human Services; Steven Escoboza, Director of the San Diego County Health and Human Services Agency, in his official capacity; San Diego Office of District Attorney; Paul Pfingst, District Attorney of the County of San Diego, in his official capacity, Defendants-Appellees,

and

Aurora, on behalf of themselves and all others similarly situated,
Defendant.

No. 04-55122.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 18, 2005.

Filed Sept. 19, 2006.

Eric Alan Isaacson, Lerach Coughlin Stoia Geller Rudman & Robbins, San Diego, CA, for the plaintiffs-appellants.

Thomas D. Bunton, Senior Deputy County Counsel, San Diego, CA, for the defendants-appellees.

Appeal from the United States District Court for the Southern District of California; Jeffrey T. Miller, District Judge, Presiding. D.C. No. CV 00-01467 JTM.

Before KLEINFELD, TASHIMA, and FISHER, Circuit Judges.

TASHIMA, Circuit Judge.

Plaintiffs-Appellants in this class action ("Appellants"), San Diego County welfare recipients, appeal from the district court's grant of summary judgment in favor of defendants, County of San Diego and various county officials (collectively, "San Diego County" or the "County"). Appellants contend that the district court erred in concluding that the County's welfare eligibility program ("Project 100%"), which requires all welfare applicants to consent to a warrantless home visit as a condition of eligibility, does not violate their rights under the United States Constitution, the California Constitution, or California welfare regulations prohibiting mass and indiscriminate home visits. Our jurisdiction is pursuant to 28 U.S.C. § 1291. We hold that San Diego County's Project 100% does not violate the United States Constitution, the California Constitution, or California welfare regulations. We therefore affirm the district court.

BACKGROUND

In 1997, the San Diego County District Attorney ("D.A.") initiated a program whereby all San Diego County residents who submit welfare applications under California's welfare program ("CalWORKS"), and are not suspected of fraud or ineligibility, are automatically enrolled in Project

100%. The parties are essentially in agreement as to the structure and operation of Project 100%. Under Project 100%, all applicants receive a home visit from an investigator employed by the D.A.'s office. The visit includes a "walk through" to gather eligibility information that is then turned over to eligibility technicians who compare that information with information supplied by the applicant. Specifically, the investigator views items confirming that: (1) the applicant has the amount of assets claimed; (2) the applicant has an eligible dependent child; (3) the applicant lives in California; and (4) an "absent" parent does not live in the residence.

When applicants submit an application for welfare benefits, they are informed that they will be subject to a mandatory home visit in order to verify their eligibility. Applicants are also informed that the home visit must be completed prior to aid being granted, but are not given notice of the exact date and time the visit will occur. The visits are generally made within 10 days of receipt of the application and during regular business hours, unless a different time is required to accommodate an applicant's schedule. The home visits are conducted by investigators from the Public Assistance Fraud Division of the D.A.'s office, who are sworn peace officers with badges and photo identification. The investigators wear plain clothes and do not carry weapons.

The actual home visit consists of two parts: an interview with the applicant regarding information submitted during the intake process, and a "walk through" of the home. The visit takes anywhere from 15 minutes to an hour, with five to 10 minutes generally allocated to the "walk through." If the applicant refuses to allow a home visit, the investigator immediately terminates the visit and reports that the applicant failed to cooperate. This generally results in the denial of

benefits.[1] The denial of welfare aid is the only consequence of refusing to allow the home visit; no criminal or other sanctions are imposed for refusing consent.

The "walk through" portion of the home visit is also conducted with the applicant's consent. The applicant is asked to lead the "walk through" and the investigator is trained to look for items in plain view. The investigator will also ask the applicant to view the interior of closets and cabinets, but will only do so with the applicant's express permission.[2] While the investigators are required to report evidence of potential criminal wrongdoing for further investigation and prosecution, there is no evidence that any criminal prosecutions for welfare fraud have stemmed from inconsistencies uncovered during a Project 100% home visit.[3]

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[1] Specifically, the D.A. investigator prepares and forwards a report regarding the home interview and visit to a welfare eligibility technician ("ET"). The ET then makes an eligibility determination based upon a review of the applicant's entire file. If the ET is unable adequately to verify the applicant's eligibility, benefits will be denied. The County has conceded that an applicant's failure to allow a home visit will generally result in the denial of benefits because the ET is unable adequately to verify the applicant's eligibility without the information included in the D.A. investigator's report.

[2] Appellants make much of the fact that investigators sometimes view the contents of laundry baskets or trash cans. The record, however, shows only one isolated instance of an investigator viewing the contents of a laundry basket, and it was done at the welfare applicant's suggestion.

[3] The County maintains that no applicant has been prosecuted for welfare fraud based upon anything observed or discovered during a home visit that contradicted information provided by the applicant. The County concedes, however, that if the home visit reveals information that an applicant may have received CalWORKS benefits in the past to which the applicant was not entitled, this information may lead to a subsequent criminal investigation. Moreover, the investigators do make referrals for criminal investigation, for example, if they discover evidence of contraband, child abuse, or a subject with outstanding felony warrants.

Appellants challenge the lawfulness of Project 100%.[4] The parties filed cross-motions for summary judgment on all claims. The district court first granted summary judgment to the County on most theories and claims for relief. It later granted summary judgment to Appellants on certain California state-law claims, enjoining the County from committing further violations of those provisions. The remaining claims, concerning violations of food-stamp regulations, were resolved by a stipulated settlement which was approved by the district court. After final judgment was entered, Appellants timely appealed the district court's decision on their claims arising under the Fourth Amendment of the United States Constitution, the California Constitution, and California welfare regulations prohibiting mass and indiscriminate home visits.

STANDARD OF REVIEW

Whether summary judgment was properly granted presents a question of law, to be reviewed *de novo*. *Lopez v.*

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[4] Appellants alleged the following claims in their first amended complaint: (1) unreasonable searches and seizures (U.S. Const. amends. IV and XIV; 42 U.S.C. § 1983; Cal. Const. Art. 1 § 13); (2) deprivation of property without due process (U.S. Const. amend. XIV; 42 U.S.C. § 1983; Cal. Const. Art. 1 § 7); (3) violation of right to privacy (Cal. Const. Art. 1 § 1); (4) unconstitutional condition for receipt of benefits under the California Constitution; (5) unlawful imposition of new eligibility criteria for welfare benefits (7 C.F.R. §§ 273.1(f)(4)(i), (iii); 45 C.F.R. § 205.100; Cal. Welf. & Inst. Code §§ 10600, 11207, 11209, 11250; California Health & Human Services Manual of Policies & Procedures ("MPP") §§ 40-161, 63-300.543); (6) unlawful elicitation of unnecessary information (7 C.F.R. § 273.2; Cal. Welf. & Inst. Code § 10500; MPP §§ 40-101.12, 40-126.31); (7) failure to limit fraud investigation referrals (Cal. Welf. & Inst. Code §§ 11055.5(d)(6), 11055.5(d)(7)); (8) unlawful mass and indiscriminate home visits (MPP §§ 20-007.33; 40-161); and (9) violation of confidentiality (7 C.F.R. § 273.2(f)(5)(ii); Cal. Welf. & Inst. Code § 10850; MPP §§ 19-007, 40-101.13, and 40-157.22).

Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). In conducting such review, "[w]e must . . . determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1131-32 (9th Cir. 2003) (citing *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc)).

DISCUSSION

I

Fourth Amendment Claim

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Appellants argue that the warrantless home visits conducted under Project 100% violate the Fourth Amendment's protection against unreasonable searches as it applies to the State of California via the Fourteenth Amendment.

A. The Home Visits are Not Searches under the Fourth Amendment

We must first decide the threshold question of whether the home visits qualify as searches within the meaning of the Fourth Amendment. Appellants contend that the home visits are searches because they are highly intrusive and their purpose is to discover evidence of welfare fraud. The Supreme Court, however, has held that home visits for welfare verification purposes are not searches under the Fourth Amend-

ment. *See Wyman v. James*, 400 U.S. 309, 317-18, 91 S. Ct. 381, 27 L. Ed. 2d 408 (1971).

In *Wyman*, the Court held that home visits by a social worker, made pursuant to the administration of New York's welfare program, were not searches because they were made for the purpose of verifying eligibility for benefits, and not as part of a criminal investigation. *Id.* While the Court's reasoning was brief, the opinion noted that the visits were "not forced or compelled, and that the beneficiary's denial of permission [was] not a criminal act." *Id.* The Court also reasoned that the visits were not searches because the beneficiary could choose to withhold consent and there would be "no entry of the home and . . . no search." *Id.* While the Court acknowledged that the nature of the visit was "both rehabilitative and investigative," importantly, the visits were not conducted as part of a *criminal* investigation. Accordingly, the Court concluded that the visits did not rise to the level of a "search in the traditional criminal law context." *Id.*[5]

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[5] While no Ninth Circuit case has applied *Wyman* to analogous facts, the Seventh Circuit did so in *S.L. v. Whitburn*, 67 F.3d 1299 (7th Cir. 1995). The court reviewed a challenge to Milwaukee County's AFDC verification program, under which county caseworkers would conduct home visits in order to verify the contents of the welfare beneficiary's application. *Id.* at 1301-02. The court applied *Wyman*, concluding that there was no search under the Fourth Amendment because caseworkers could only enter applicants' homes with their consent, refusal to consent was not a criminal act, and the underlying purpose of the visits was not criminal prosecution. *Id.* at 1307.

Wyman directly controls the instant case.[6] Here, as in *Wyman*, all prospective welfare beneficiaries are subject to mandatory home visits for the purpose of verifying eligibility, and not as part of a criminal investigation. The investigators conduct an in-home interview and "walk through," looking for inconsistencies between the prospective beneficiary's application and her actual living conditions. As in *Wyman*, the home visits are conducted with the applicant's consent, and if consent is denied, the visit will not occur. Also as in *Wyman*, there is no penalty for refusing to consent to the home visit, other than denial of benefits.[7] *Id.* at 325,

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[6] The dissent contends that "*Wyman* is factually distinguishable" and thus not binding. Dissent at 936. In support of this contention, the dissent relies primarily on its assertion that the *Wyman* home visits were "primarily rehabilitative," dissent at 932, and that "the Project 100% home visits have only a minimal, if any, rehabilitative function." Dissent at 934. There are two problems with this assertion. First, *Wyman* is based on two alternative holdings. As to its first holding-that the New York home visits were not searches-the only rehabilitative purpose on which the Court relied was its discussion of the federal welfare laws and their purpose of providing "financial assistance and rehabilitation and other services . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life . . . ." *Wyman*, 400 U.S. at 315, 91 S. Ct. 381 (ellipses in the original) (citation and internal quotation marks omitted). The federal welfare laws are the same background against which San Diego County's welfare program is administered. So, on *Wyman's* first holding, there is no greater showing of a rehabilitative purpose than there is in this case. Second, and thusly, the dissent's attempt to distinguish this case from *Wyman* go only to *Wyman's* alternative holding-that even if the home visits are considered to be Fourth Amendment searches, they are reasonable. Thus, the dissent's assertion that *Wyman* is not binding is unpersuasive because it does not address *Wyman's* primary holding that a welfare verification home visit is not a Fourth Amendment search at all.

[7] The dissent suggests that Project 100%'s lack of a rehabilitative purpose sufficiently distinguishes this case from *Wyman* for purposes of determining whether the home visits constitute searches in the traditional criminal law context. *See* Dissent at 934 - 935. First, as we point out in the immediately preceding footnote, the search in *Wyman* had no more of a rehabilitative purpose than the search here. Second, and in any event,

91 S. Ct. 381. The fact that the D.A. investigators who make the Project 100% home visits are sworn peace officers does not cause the home visits to rise to the level of a "search in the traditional criminal law context" because the visits' underlying purpose remains the determination of welfare eligibility. *See id.* at 317, 91 S. Ct. 381; *see also New York v. Burger*, 482 U.S. 691, 717, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987) ("[W]e fail to see any constitutional significance in

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whether the home visits serve a rehabilitative purpose is not the determinative inquiry under *Wyman*. As the dissent acknowledges, this factor is relevant only insofar as it indicates that the home visits are not intended as searches conducted in furtherance of a criminal investigation. *See* Dissent at 936. ("*Wyman* concluded that New York's home visit was not 'in aid of any criminal proceeding' in part because it viewed the possibility of the caseworker visit leading to the discovery of fraud and a subsequent criminal prosecution as purely speculative." (citing *Wyman*, 400 U.S. at 323, 91 S. Ct. 381)).

Moreover, as the dissent acknowledges, *Wyman expressly* states that "if the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow, then . . . that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct." *Id.* The dissent attempts to distinguish this case from *Wyman* by suggesting that "the County's program requires fraud investigators . . . to detect and report evidence of welfare fraud and other crimes." Dissent at 11532. This suggestion, however, simply does not square with the record. Project 100% does not *affirmatively* require that D.A. investigators look for evidence of welfare fraud or other crimes; rather, it is simply the duty of the investigators, as sworn peace officers, to report perceived evidence of unlawful activity. As Luis Aragon, the Chief of the D.A.'s Public Assistance Fraud Division, testified, the investigators are not tasked with "develop[ing] . . . evidence . . . that can be used in any other type of prosecution, but they're also not deaf and dumb. If they observe or are made aware of a situation that causes them to be concerned that unlawful activity has occurred, I expect they will report it to whatever the appropriate source is."

the fact that police officers, rather than 'administrative' agents, are permitted to conduct the [ ] inspection.").[8]

Therefore, because we are bound by *Wyman*, we conclude that the Project 100% home visits do not qualify as searches within the meaning of the Fourth Amendment.

B. Even if the Home Visits are Searches, they are Reasonable

"[W]hether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individ-

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[8] We note that *Wyman's* reasoning on the question of whether the home visits are searches under the Fourth Amendment arguably has been called into question by the Supreme Court's subsequent Fourth Amendment jurisprudence. The Court has since repeatedly held that consensual administrative searches qualify as searches under the Fourth Amendment, even though refusal to consent carried no criminal penalty and the searches were not part of a criminal investigation. *See, e.g., Bd. of Educ. v. Earls*, 536 U.S. 822, 833, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002) (holding that consensual random drug testing of students participating in extra-curricular activities were searches under the Fourth Amendment even though they were not part of a criminal investigation and a positive test resulted only in suspension from participation); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) (same); *see also United States v. Gonzalez*, 300 F.3d 1048 (9th Cir. 2002) (holding that consensual suspicionless searches of government employees' personal belongings in the workplace were searches even though refusal to consent carried no criminal penalty and the searches were not for law enforcement purposes). *Wyman*, however, still controls this case because of its "direct application," despite the reasoning of these later administrative search cases. *See Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989))); *see also United States v. Hatter*, 532 U.S. 557, 567, 121 S. Ct. 1782, 149 L. Ed. 2d 820 (2001).

ual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia Sch. Dist.*, 515 U.S. at 652-53, 115 S. Ct. 2386 (internal quotation marks omitted). The district court found that the Project 100% home visits, even if considered searches, were reasonable under *Wyman*. Although we need not reach the question to decide Appellants' Fourth Amendment challenge, because the home visits do not constitute searches under *Wyman*, we agree with the district court that even if the home visits are searches under the Fourth Amendment, they are reasonable.[9]

1. *Wyman v. James*

In *Wyman*, the Court concluded that the home visits, even if considered a search, were valid under the Fourth Amendment "because [they] did not descend to the level of unreasonableness . . . which is the Fourth Amendment's standard." *Wyman*, 400 U.S. at 318, 91 S. Ct. 381. The Court weighed several factors in balancing the governmental interest in conducting home visits against the intrusion into the welfare applicant's privacy. *Id.* at 318-24, 91 S. Ct. 381. Relevant to this analysis were: (1) the public's strong interest in the protection of dependent children and ensuring that aid provided from tax revenue reaches its intended and proper recipients; (2) the statute's focus on assistance and rehabilitation; (3) that the home visit was not a criminal investigation and did not involve police or uniformed authority; (4) the visits' procedural safeguards, including providing

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[9] Although we need not resolve the issue for Fourth Amendment purposes, nonetheless, addressing the "reasonableness" and "special needs" issues is helpful in analyzing Appellants' challenge under Article I § 13 of the California Constitution. While California's constitutional analysis parallels the inquiry under the Fourth Amendment, *see* Part II.A, *infra*, the California Supreme Court, in its parallel analysis of the California Constitution, is not bound by the strictures of *Agostini*, 521 U.S. at 237, 117 S. Ct. 1997, as noted in footnote 8, *supra*.

advanced written notice and prohibiting forced entry or "snooping" within the home; and (5) the serious administrative difficulties posed by a warrant requirement in the welfare context. *Id.*[10]

Here, as in *Wyman*, the home visits serve the important governmental interests of verifying an applicant's eligibility for welfare benefits and preventing fraud. As the Court acknowledged in *Wyman*, the public has a strong interest in ensuring that aid provided from tax dollars reaches its proper and intended recipients. *Id.* at 318, 91 S. Ct. 381. While the visits in this case differ from those in *Wyman* in that they are conducted by peace officers, this distinction does not transform a Project 100% visit into a "search in the traditional criminal law context." *Id.* at 317, 91 S. Ct. 381.[11] The in-

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[10] The Court also distinguished *Wyman* from its earlier decisions in *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), and *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1741, 18 L. Ed. 2d 930 (1967), where the petitioners had been criminally cited for refusing to consent to the warrantless inspections of their home and commercial warehouse, conducted to ensure health and safety code compliance. While the Court struck down the warrantless inspections in those cases, it noted that they involved a true search for violations and refusal to consent to inspection carried criminal penalties, whereas in *Wyman*, refusal to consent resulted only in a denial of welfare benefits. *Wyman*, 400 U.S. at 324-25, 91 S. Ct. 381.

[11] This conclusion is further supported by subsequent Supreme Court decisions. For example, in *Burger*, the Court upheld the warrantless inspection of a vehicle-dismantling business by uniformed police officers, reasoning:

> [W]e fail to see any constitutional significance in the fact that police officers, rather than "administrative" agents, are permitted to conduct the [ ] inspection. The significance respondent alleges lies in the role of police officers as enforcers of the penal laws and in the officers' power to arrest for offenses other than violations of the administrative scheme. It is, however, important to note that state police officers, like those in

vestigators are not uniformed officers and will only enter the applicant's home with consent. Although the investigators will report any evidence of criminal activity for potential prosecution, this is not the underlying purpose of the visit, and no criminal prosecutions for welfare fraud have stemmed from inconsistencies uncovered during a Project 100% home visit since the program's inception in 1997.[12]

> New York, have numerous duties in addition to those associated with traditional police work . . . . So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself.

482 U.S. at 717, 107 S. Ct. 2636.

[12] The record shows that investigators would pass along evidence of criminal activity, such as drug use, child abuse, or even *past* welfare fraud, discovered during the course of a home visit. There is no evidence, however, that applicants have ever been prosecuted for welfare fraud as a result of inconsistencies discovered during the home visit, supporting a conclusion that the visits are intended, and in fact used, only as an eligibility verification tool. But the dissent "fail[s] to see why it follows from the lack of prosecutions for current or attempted welfare fraud that the home visits do not rise to the level of a traditional Fourth Amendment search." Dissent at 936 n. 6. We need look no further than *Wyman*, however, to learn why the discovery of evidence of other crimes does not cause a home visit to rise to the level of a Fourth Amendment search:

> If the visitation serves to discourage misrepresentation or fraud, such a byproduct of that visit does not impress upon the visit itself a dominant criminal investigative aspect. And if the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow . . . that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct.

Wyman, 400 U.S. at 323, 91 S. Ct. 381; *see also Burger*, 482 U.S. at 717, 107 S. Ct. 2636 ("So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting offi-

The Project 100% home visits also have many of the same procedural safeguards that the *Wyman* Court found significant. *See Wyman*, 400 U.S. at 320-21, 91 S. Ct. 381. Applicants are given notice that they will be subject to a mandatory home visit and visits generally occur only during normal business hours. When the investigators arrive to conduct the visit, they must ask for consent to enter the home. If the applicant does not consent to the visit, or withdraws consent at anytime during the visit, the visit will not begin or will immediately be terminated, as the case may be.[13]

Finally, the Court's concern that a warrant requirement would pose serious administrative difficulties in the welfare context is also present in this case. *Id.* at 323-24, 91 S. Ct. 381 ("The warrant procedure, which the plaintiff appears to claim to be so precious to her, even if civil in nature, is not without its seriously objectionable features in the welfare context."). As the Court in *Wyman* explained, "if a warrant

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cer has the power to arrest individuals for violations other than those created by the scheme itself.").

[13] In *Wyman*, the Court explained that any "burden" upon a homeowner's right against unreasonable intrusion is minimized because "[f]orcible entry or entry under false pretenses or visitation outside working hours or snooping in the home are forbidden." *Wyman*, 400 U.S. at 319-322, 91 S. Ct. at 387-88. While Appellants and the dissent, Dissent at 11533, argue that Project 100% allows "snooping" because investigators ask homeowners to open closets and drawers, we disagree. The Project 100% investigators only ask to view the contents of closets or drawers for verification-related purposes, and will do so only with the homeowner's explicit consent. For example, investigators may verify that children live in the home by asking to see children's clothing. Similarly, if the applicant is a single mother, investigators may verify that no males live in the home by asking to see the contents of the medicine cabinet. Since the investigators have *legitimate* verification-related reasons for viewing such items not in plain view, and only do so with the homeowner's explicit consent, their activity cannot fairly be characterized as "snooping."

could be obtained, it presumably could be applied for *ex parte*, its execution would require no notice, it would justify entry by force, and its hours for execution would not be so limited as those prescribed for home visitation." *Id.* This type of warrant requirement would make home visits more intrusive than the County's current suspicionless home visit program because welfare applicants' rights and privacy would be subject to greater infringement.

Therefore, because the Project 100% visits serve an important governmental interest, are not criminal investigations, occur with advance notice and the applicant's consent, and alleviate the serious administrative difficulties associated with welfare eligibility verification, we hold that the home visits are reasonable under the Supreme Court's decision in *Wyman*.

2. "Special Needs" Cases

While *Wyman* provides adequate, independent grounds for holding that the Project 100% home visits are reasonable, the Supreme Court's Fourth Amendment jurisprudence has evolved significantly since *Wyman*, providing further support for this conclusion. Subsequent to *Wyman*, the Court articulated its "special needs" exception to the warrant requirement, holding that "[a] search unsupported by probable cause can be constitutional . . . when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) (internal quotation marks omitted). The Court's "special needs" analysis involves two steps: (1) determining whether the government has articulated a valid "special need;" and, (2) analyzing whether the proposed administrative search is justified in light of that articulated "special need." *United States v. Scott*, 450 F.3d 863, 869-72 (9th Cir. 2006).

a. The County's administration of its welfare system is a "special need"

In *Griffin*, the Supreme Court examined whether the State's operation of its probation system was a "special need" that justified the warrantless search of a probationer's home, based on reasonable grounds to suspect the presence of contraband. *Griffin*, 483 U.S. at 872, 107 S. Ct. 3164. The Court held that the operation of a probation system was a valid "special need," explaining that the system worked towards genuine rehabilitation through intensive supervision and that a "warrant requirement would interfere to an appreciable degree." *Id.* at 873-76, 107 S. Ct. 3164.

More recently, in *Earls*, the Court reaffirmed its "special needs" reasoning, holding that a public school's policy of requiring suspicionless drug testing for student athletes was justified in light of the school's "special need" to prevent and deter drug use among its students. *Earls*, 536 U.S. at 838, 122 S. Ct. 2559. The Court emphasized that the searches were not conducted for law enforcement purposes, and explained that the "special need" justified the intrusion on the student's privacy without individualized suspicion. *Id.* at 829, 122 S. Ct. 2559.

In *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001), however, the Court held that a public hospital's policy of identifying and testing mothers whose children tested positive for drugs at birth was not justified under the "special needs" doctrine because "the immediate objective of the searches was to generate evidence *for law enforcement purposes.*" *Id.* at 83, 121 S. Ct. 1281 (emphasis in the original). The Court explained that the "central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients

into substance abuse treatment," and concluded that "the purpose actually served by the [ ] searches is ultimately indistinguishable from the general interest in crime control." *Id.* at 81, 121 S. Ct. 1281 (internal quotation marks omitted).

Ferguson turned on the fact that the searches at issue were conducted for general law enforcement purposes. *See id.* The Court emphasized that while the drug testing program partially served a non-criminal purpose, the program's efficacy was ultimately tied to the successful prosecution of mothers whose children tested positive for drugs. *Id.* at 82-84, 121 S. Ct. 1281. In *Wyman*, however, the Court specifically noted that home visits in the welfare context primarily serve the administrative function of eligibility verification, which is not a general law enforcement purpose. *Wyman*, 400 U.S. at 326, 91 S. Ct. 381. As discussed *supra*, the primary purpose of the Project 100% home visits is to verify eligibility for welfare benefits. While there may be a fine line between verifying eligibility and investigating fraud, the record here supports that the visits are indeed used primarily for verification and prevention purposes. Since the program's inception in 1997, not a single criminal prosecution for welfare fraud has resulted from inconsistencies uncovered during a Project 100% home visit. While investigators are required to report evidence of criminal violations for potential prosecution, this does not make the home visits criminal investigations. *See Wyman*, 400 U.S. at 317, 91 S. Ct. 381. Moreover, unlike in *Ferguson*, 532 U.S. at 82-84, 121 S. Ct. 1281, Project 100%'s efficacy is not dependent upon the prosecution of suspected welfare fraud cases.

Therefore, because the underlying purpose of the home visits is to verify eligibility for welfare benefits, and not for general law enforcement purposes, we conclude that San Diego County has articulated a valid "special need."

b. Project 100% is reasonable in light of the County's "special need"

Because we conclude that the administration of the County's welfare system presents a "special need" beyond those of normal law enforcement, we must now determine whether this need is "important enough to override the individual's acknowledged privacy interest [and] sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 318, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997). "[W]hether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia*, 515 U.S. at 652-53, 115 S. Ct. 2386 (internal quotation marks omitted). Specifically, we consider: (1) the nature of the privacy interest upon which the search intrudes; (2) the character of the intrusion; and (3) the importance of the government interest at stake. *See Earls*, 536 U.S. at 830-34, 122 S. Ct. 2559; *Vernonia*, 515 U.S. at 654-61, 115 S. Ct. 2386.

Here, the nature of Appellants' privacy interest is significant because the government is conducting searches of their homes, a traditionally protected area of personal privacy.[14]

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[14] The dissent quotes *Kyllo v. United States*, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) ("[T]he Fourth Amendment draws a firm line at the entrance to the house."), to support its assertion that the County's home visits are unreasonable. Dissent at 943. *Kyllo*, however, is completely inapposite and has no application to this case. The dissent's extensive reliance on *Kyllo* here and elsewhere, *see* Dissent at 937, 939, 941, is misplaced because *Kyllo* involved a classic criminal law enforcement investigation conducted without the homeowner's consent. Likewise, the dissent's extensive reliance on *Scott*, *see* Dissent at 937 - 938, 939, 940, 941, 942 n. 13, is also misplaced. *Scott* expressly held that the scheme under examination there did not qualify under the special

As illustrated by *Griffin*, however, a person's relationship with the state can reduce that person's expectation of privacy even within the sanctity of the home. When eligibility depends, in part, upon a person's physical residence in the state and actual presence at the place designated as their residence, verification of eligibility may be reasonably required in the form of the home visit under review here in order to ensure that funds are properly spent. Moreover, the home visits are conducted with the applicant's express consent, thus, further reducing the applicant's expectation of privacy.[15] Therefore, it is reasonable for welfare applicants who desire direct cash governmental aid to undergo eligibility verification through home visits.

Next, we must weigh the character of the intrusion on Appellants' privacy. Appellants argue that the home visits are virtually unlimited in scope. As discussed above, however, the record demonstrates that the procedures used in conducting the home visits are designed to reduce the intrusion on the applicant's privacy. Investigators only examine

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needs doctrine. *See* 450 F.3d at 872. Here, in contrast, the dissent "agree[s] with the majority that the County has articulated a valid 'special need' beyond ordinary law enforcement concerns." Dissent at 939.

[15] Without citing any authority, the dissent asserts that a welfare applicant's consent to a home visit does nothing to reduce her expectation of privacy because "the coercive nature of the home visit renders the notion of consent effectively meaningless." Dissent at 942. *Wyman*, however, addresses this very concern and reaches the opposite conclusion that even though the consequence of refusing a home visit is the denial of benefits, "[t]he choice is entirely [the applicant's], and *nothing of constitutional magnitude is involved.*" *Wyman*, 400 U.S. at 325, 91 S. Ct. 381 (emphasis added).

In addition, this Court has recently observed that "government may sometimes condition benefits on waiver of Fourth Amendment rights-for instance, when dealing with contractors, or *paying welfare benefits.*" *Scott*, 450 F.3d at 867-68 (citing *Wyman*, 400 U.S. at 317-18, 91 S. Ct. 381) (emphasis added).

areas of the home that they believe will provide relevant information pertaining to the applicant's welfare eligibility. If at any point before or during the visit, the applicant refuses to consent, or withdraws consent, the visit ends immediately. Additionally, inspections are completed in a reasonable amount of time and there is no evidence that any of the applicants has been subjected to abusive behavior during the home visits.

Finally, we must analyze the need for the intrusion in light of its efficacy in achieving the governmental interests at stake. Appellants argue that there is no statistically significant evidence that Project 100% has actually reduced welfare fraud. The County, however, produced data showing that, during the five-year period during which Project 100% was implemented, the overall denial rate increased from 40.6% to 47.7%, and there was an additional 4-5% increase in application withdrawals. While it is difficult to measure the precise efficacy of Project 100%, these empirical observations support the logical connection between the home visits and their intended purpose. Moreover, the visits are an effective method of verifying eligibility for benefits, and, at a minimum, the visits provide an important deterrent effect.

Appellants also contend that all necessary information for purposes of verification can be obtained from other sources and that the home visits merely duplicate the intake interviews. The Supreme Court has stressed, however, that the Fourth Amendment does not require that the government use the least intrusive means "because the logic of such elaborate less-restrictive alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Earls*, 536 U.S. at 837, 122 S. Ct. 2559. More importantly, the Court has already rejected a similar argument in *Wyman*, explaining that "[a]lthough . . . secondary sources might be helpful, they would not always

assure verification of actual residence or of actual physical presence in the home, which are requisites for AFDC benefits . . . ." *Wyman*, 400 U.S. at 322, 91 S. Ct. 381.

Accordingly, because the Project 100% home visits are conducted in a reasonable manner, and serve an important administrative purpose, the Supreme Court's "special needs" line of cases provides further support for our conclusion that the home visits are reasonable under the Fourth Amendment.[16]

II

California Claims

A. Article I § 13 of the California Constitution

Appellants argue that the Project 100% home visits violate their right to be free from unreasonable searches under Article I § 13 of the California Constitution. Appellants rely on *People v. Brisendine*, 13 Cal. 3d 528, 119 Cal. Rptr. 315, 531 P.2d 1099 (1975), *superseded on other grounds by In re Lance W.*, 37 Cal. 3d 873, 210 Cal. Rptr. 631, 694 P.2d 744 (1985), for the proposition that California courts interpret Article I § 13 as demanding broader protection than the Fourth Amendment.[17]

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[16] In *Samson v. California*, — U.S. —, — n. 4, 126 S. Ct. 2193, 2201 n. 4, 165 L. Ed. 2d 250 (2006), the Court recently noted that it has "sanctioned suspicionless searches in limited circumstances, namely programmatic and special needs searches . . . ."

[17] In *Brisendine*, the California Supreme Court departed from the Supreme Court's Fourth Amendment standards, imposing broader limitations on searches incident to a lawful arrest. *Brisendine*, 119 Cal. Rptr. 315, 531 P.2d at 1111-15. In doing so, the court explained that "[i]n the search and seizure area our decisions have often comported with federal law, yet there has never been any question that this similarity was a matter of choice and not compulsion." *Id.* at 1112.

The California Supreme Court has made clear, however, that "[t]he touchstone for all issues under the Fourth Amendment and article I, section 13 of the California Constitution is reasonableness." *Ingersoll v. Palmer*, 43 Cal. 3d 1321, 241 Cal. Rptr. 42, 743 P.2d 1299, 1304 (1987). This language indicates that the right to be free from unreasonable searches under Art. I § 13 of the California Constitution parallels the Fourth Amendment inquiry into the reasonableness of a search. *See e.g., Smith v. Los Angeles County Bd. of Supervisors*, 104 Cal. App. 4th 1104, 128 Cal. Rptr. 2d 700 (2002) (applying the Supreme Court's "special needs" rationale and *Wyman* to deny a similar challenge to a Los Angeles County welfare eligibility verification program arising under the state *and* federal constitutions); *see also Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 26 Cal. Rptr. 2d 834, 865 P.2d 633, 650 (1994) ("The 'privacy' protected [under state law] is no broader in the area of search and seizure than the 'privacy' protected by the Fourth Amendment or by article I, section 13 of the California Constitution."). Accordingly, for the reasons discussed in Part I.B, *supra*, even assuming that Project 100% home visits qualify as searches, they are reasonable under the California Constitution.

Appellants nonetheless maintain that the California Supreme Court's decision in *Parrish v. Civil Service Commission*, 66 Cal.2d 260, 57 Cal. Rptr. 623, 425 P.2d 223 (1967), demonstrates that the California Constitution provides broader protection than its federal counterpart in the context of this case. *Parrish*, however, does not purport to expand the protections granted by the California Constitution beyond those granted by the United States Constitution, and instead, explicitly relies on *federal* law. *See id.* at 227 (citing *Frank v. Maryland*, 359 U.S. 360, 79 S. Ct. 804, 3 L. Ed. 2d 877

(1959)).[18] Moreover, *Parrish* is easily distinguished from the instant case.

In *Parrish*, the Alameda County welfare department conducted a series of suspicionless, unannounced early-morning raids of the homes of the county's welfare recipients in order to detect the presence of unauthorized males. *Id.* at 225. The purpose of the raids on recipients not suspected of fraud was to "persuade the public that the incidence of welfare fraud falls below popular estimates." *Id.* at 232. The raids were conducted at 6:30 a.m. on a Sunday by a pair of social workers. *Id.* at 225. The welfare recipient's social worker would knock on the recipient's door and request entry. *Id.* at 225-26. Refusal to consent could serve as a basis for terminating welfare benefits. *Id.* at 228. If consent was given, the caseworker would immediately proceed to the back door to admit his or her partner, with the pair proceeding to search the entire residence for evidence of welfare fraud. *Id.* at 226.

The court rejected the County's argument that the searches were administrative searches that could properly be conducted without probable cause and a warrant. *Id.* at 226-28. The court reasoned that the searches were very inconvenient to the occupant, were conducted without suspicion of fraud, and were far removed from orderly daytime administrative searches. *Id.* at 227-28. The court also reasoned that the raids could not be justified by consent because "[t]he request for entry by persons whom the beneficiaries knew to possess virtually unlimited power over their very livelihood

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[18] The *Parrish* court's discussion of the reasonableness of the search and the voluntariness of consent raises serious doubts that the court relied on the California Constitution in finding that the searches were unreasonable. This is illustrated by the court's express statements addressing the issue in the case as one under the Fourth Amendment without reference to the California Constitution and the court's analysis of the reasonableness of the search under United States Supreme Court precedent. *See id.*

. . . nulli[fied] the legal effectiveness of the apparent consent." *Id.* at 229-30.

Even assuming that *Parrish* was decided under the California Constitution, and that the California Constitution provides broader protection than the Fourth Amendment, it is nonetheless clearly distinguishable and, thus, inapplicable under the facts of this case. *Parrish* involved mass raids, conducted without advance warning, on a Sunday morning at 6:30 a.m. *Id.* at 225-26. The purpose of the raids in *Parrish* was to demonstrate the efficiency of welfare fraud detection to the public. *Id.* at 225. On the other hand, the Project 100% home visits are orderly daytime administrative searches conducted to verify welfare eligibility and prevent fraud. The Project 100% investigators provide the welfare applicants advance notice that they will be subject to a home visit and only conduct visits during business hours. As the *Parrish* court itself noted, there is a "great gulf which separates an 'orderly' afternoon visit from the searches conducted shortly after dawn in the present case." *Id.* at 228.

We conclude therefore that *Parrish* provides no support for the hypothesis that Article I § 13 of the California Constitution provides greater protection than the Fourth Amendment in the context of this case. We conclude that the Project 100% home visits are reasonable under Article I § 13 of the California Constitution.

B. Article I § 1 of the California Constitution

Appellants also argue that the Project 100% home visits violate their right to privacy under Article I § 1 of the California Constitution. As the California Supreme Court has recognized, however, in *In re York*, 9 Cal. 4th 1133, 40 Cal. Rptr. 2d 308, 892 P.2d 804 (1995), "in the search and seizure context, the article I, section 1, privacy clause of the Califor-

nia Constitution has never been held to establish a broader protection than that provided by the Fourth Amendment of the United States Constitution or article I, section 13 of the California Constitution." *Id.* at 813 (citations and internal quotation marks omitted); *see also Hill*, 26 Cal. Rptr. 2d 834, 865 P.2d at 650 n. 9. Therefore, Appellants' contention that Project 100% violates Article I § 1 of the California Constitution also fails because, as we have held, Project 100% searches are reasonable under the Fourth Amendment and Article 1 § 13 of the California Constitution.

C. Unconstitutional Conditions Doctrine

The California unconstitutional conditions doctrine holds that where the "receipt of a public benefit is conditioned upon the waiver of a constitutional right, the government bears a heavy burden of demonstrating the practical necessity for the limitation." *Robbins v. Superior Court*, 38 Cal. 3d 199, 211 Cal. Rptr. 398, 695 P.2d 695, 704 (1985) (internal quotation marks omitted). Under the unconstitutional conditions doctrine, the governmental entity seeking to impose such a condition must establish that:

> (1) the conditions reasonably relate to the purposes sought by the legislation which confers the benefit;
>
> (2) the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and (3) there are no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.

Parrish, 425 P.2d at 230-31 (citations omitted).

A plaintiff alleging a violation of the unconstitutional conditions doctrine, however, must first establish that a constitutional right is infringed upon. *Id.* Here, Appellants must establish that San Diego County is conditioning the receipt of welfare benefits on the waiver of a constitutional right. Because we have held that the Project 100% home visits are reasonable, the receipt of welfare benefits is not being conditioned upon the waiver of a constitutional right under either the California or federal constitutions because the Fourth Amendment and Article 1 § 13 only create a right to be free from *unreasonable* government intrusions into the home. *See Earls*, 536 U.S. at 828, 122 S. Ct. 2559; *In re York*, 40 Cal. Rptr. 2d 308, 892 P.2d at 813.

D. State Regulation Prohibiting "Mass" & "Indiscriminate" Home Visits

Appellants contend that Project 100% violates MPP § 20-007.33, which prohibits "[m]ass or indiscriminate home visits." Appellants argue that the home visits in this case are both "mass" and "indiscriminate" because they are performed on all applicants for aid and do not discriminate between applicants based on any reasonable suspicion of fraud.

A careful reading of MPP § 20-007 as a whole, however, reveals that the regulation applies only to Special Investigative Units "*investigating suspected welfare fraud and suspected violations of the law.*" MPP § 20-007.1 (emphasis added). Based on the plain language of the regulation, we conclude that the California Department of Social Services did not intend to apply § 20-007.33 to the home visits at hand because the Project 100% investigators are *not* conducting for-cause investigations.[19] Moreover, the same ar-

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[19] While MPP § 20-007.33 applies to for-cause home visits, the controlling statutory scheme also clearly provides for the creation of not-for-cause early fraud prevention programs such as Project 100%. *See* Cal.

gument raised by Appellants in this case was rejected by the California Court of Appeal in *Smith*, 128 Cal. Rptr. 2d at 706, which held that California's prohibition against "mass or indiscriminate" home visits, "which is contained in the MPP's voluminous fraud investigation procedures, [did not] limit procedures that are provided elsewhere in the MPP, and specifically in MPP [40-161], for determinations of eligibility for CalWORKS benefits." Accordingly, we hold that MPP § 20-007.33's prohibition against "mass or indiscriminate" home visits does not apply to the case at bench.

CONCLUSION

We conclude that the Project 100% home visits are not Fourth Amendment searches under *Wyman*. Even assuming that they are searches, they are reasonable under *Wyman* and the Supreme Court's subsequent "special needs" cases. Because Project 100% searches are reasonable, they do not violate the Fourth Amendment or the California Constitution. Finally, MPP § 20-007.33's prohibition against "mass and indiscriminate home visits" is inapplicable to Project 100% home visits because § 20-007.33 applies only to for-cause home visits.

Accordingly, the district court's grant of summary judgment in favor of San Diego County is **AFFIRMED.**

Welf. & Inst. Code § 11055.5. Accordingly, since the MPP has no parallel provision prohibiting "mass and indiscriminate" home visits in the context of *suspicionless* home visits, we must assume that DSS intended to exclude situations such as this.

FISHER, Circuit Judge, dissenting:

I cannot agree with the majority's conclusion that *Wyman v. James*, 400 U.S. 309, 91 S. Ct. 381, 27 L. Ed. 2d 408 (1971), "directly controls" our resolution of this case. *See* Maj. Op. at 921. Unlike the case before us, *Wyman* involved a primarily *rehabilitative* home visit by a social assistance caseworker "whose primary objective [was], or should [have been], the welfare, not the prosecution, of the aid recipient for whom the worker [had] profound responsibility." 400 U.S. at 323-24, 91 S. Ct. 381. That is a far cry from the program carried out by the County of San Diego, whose Project 100% home visits entail a law enforcement agent-trained *not* to give advice to welfare applicants-walking through the applicant's home in search of physical evidence of ineligibility that could lead to criminal prosecution either for welfare fraud or other crimes unrelated to the welfare application. In light of the significant differences in scope and implementation between the home visits at issue in *Wyman* and those challenged here, I disagree with the majority's conclusion that the home visits do not rise to the level of a Fourth Amendment search.

Nor do I agree with the majority's improper discounting of the Appellants' heightened privacy interest in their home. In the majority's view, even if the home visit is a search, it is reasonable because the Appellants' relationship with the state as potential welfare recipients "reduce[s] the expectation of privacy even within the sanctity of the home." Maj. Op. at 927. To support this conclusion, the majority relies on *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987), a case that upheld the constitutionality of a warrantless search of a probationer's home. By suggesting that welfare applicants may be treated the same as convicted criminals, the majority ignores the limits implicit-and explicit-in *Griffin*.

The Project 100% home visits constitute searches because they violate "a subjective expectation of privacy [in the home] that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). Even assuming the County's need to verify eligibility and prevent fraud, that legitimate need is not "important enough to override the [welfare applicant's] acknowledged privacy interest" in the home nor "sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 318, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997). The visits as implemented are unreasonable searches under the Fourth Amendment and Article I § 13 of the California Constitution. They also violate the Appellants' right to privacy and the unconstitutional conditions doctrine under California law. I respectfully dissent.

I.

It is well established that the Fourth Amendment protects a citizen's "legitimate expectation of privacy in the invaded place." *Minnesota v. Olson*, 495 U.S. 91, 95, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)). "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness,' . . . . [and] whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-53, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) (citations and internal quotations omitted). Thus, the first question is whether the County's home visits are searches.

In *Wyman*, the Supreme Court held that a primarily rehabilitative home visit by a New York social assistance caseworker did not constitute a search for purposes of the Fourth Amendment. 400 U.S. at 317-18, 91 S. Ct. 381. The Court further held that even if the visit were a search, it "[did] not fall within the Fourth Amendment's proscription" because it was reasonable. *Id.* at 318, 91 S. Ct. 381. Several aspects of New York's home visit program-absent in Project 100%-persuaded the Court to reach these conclusions, and the majority too readily dismisses the fundamental differences between the two programs when it holds that *Wyman* "directly controls" this case. Maj. Op. at 921.

As an initial matter, the majority reads *Wyman's* narrow holding too broadly. *Wyman* did not create a blanket rule that "home visits for welfare verification purposes are not searches under the Fourth Amendment." *See* Maj. Op. at 920. Rather, *Wyman's* holding was specific to the facts before it:

> We therefore conclude that the home visitation *as structured by the New York statutes and regulations* is a reasonable administrative tool; that *it* serves a valid and proper administrative purpose for the dispensation of the AFDC program; that *it* is not an unwarranted invasion of personal privacy; and that *it* violates no right guaranteed by the Fourth Amendment.

Wyman, 400 U.S. at 326, 91 S. Ct. 381 (emphasis added). Indeed, the Court explicitly left open the possibility that home visits, such as the one before us today, might run afoul of Fourth Amendment principles: "Our holding today does not mean, of course, that a termination of benefits upon refusal of a home visit is to be upheld against constitutional challenge under all conceivable circumstances." *Id.* With

this more proper understanding of *Wyman's* holding in mind, I do not believe we are bound to hold that the Project 100% home visits are not searches.

First, as the majority recognizes, *Wyman* emphasized that although the caseworker visits were "both rehabilitative and investigative," *id.* at 317, 91 S. Ct. 381, the investigative aspect "did not rise to the level of a 'search in the traditional criminal law context.'" Maj. Op. at 921 (quoting *Wyman*, 400 U.S. at 317, 91 S. Ct. 381). In effect, the Court concluded that the New York home visit was primarily *rehabilitative. See Wyman*, 400 U.S. at 323, 91 S. Ct. 381 (explaining that "the program concerns dependent children and the needy families of those children. *It does not deal with crime or with the actual or suspected perpetrators of crime.* The caseworker is *not a sleuth* but rather, we trust, is a *friend to one in need.*") (emphasis added). The Court also found significant that "snooping in the home [is] forbidden." *Id.* at 321, 91 S. Ct. 381.

In concluding that *Wyman* binds us, the majority notes that the caseworker visits there, like the Project 100% visits, were conducted with the applicant's consent, and that the only penalty for refusing consent is the denial of benefits. Maj. Op. at 921 - 923. At the same time, the majority correctly recognizes that the Project 100% home visits are made not by social workers but by *district attorney fraud investigators.* Maj. Op. at 921 - 922, 923 - 924. However, the majority concludes that this difference "does not cause the home visits to rise to the level of a 'search in the traditional criminal law context' because the visits' underlying purpose remains the determination of welfare eligibility." Maj. Op. at 922 (quoting *Wyman*, 400 U.S. at 317, 91 S. Ct. 381); *see also id.* at 923 - 924. In addition, the majority dismisses the Appellants' claims of snooping because the investigators "ask to view the contents of closets or drawers for verifica-

tion-related purposes, and will do so only with the homeowner's explicit consent." Maj. Op. at 924 - 925 n. 13.

I find the majority's analysis troubling in several respects. To begin, the majority admittedly draws a "fine line" between searches to determine eligibility and those aimed at investigating fraud. *See* Maj. Op. at 926. In practice, the distinction is one without a difference. In verifying eligibility, fraud investigators-as their job title suggests-necessarily are investigating potential fraud through their enforcement of welfare laws and regulations. Indeed, unlike in *Wyman*, the investigators testified that as peace officers they have a duty to-and do-look for and report evidence of crimes.[1] [*See*, *e.g.*, ER 85, Ex.14:76, Ex. 1:169, Ex. 8:42-43] Thus, we do not, as the majority suggests, deal here with a visitation that "serves to discourage misrepresentation or fraud" as a mere "*byproduct* of that visit," as was the case in *Wyman*. *See* Maj. Op. at 924 n. 12 (quoting *Wyman*, 400 U.S. at 323, 91 S. Ct. 381) (emphasis added).

At the same time, the majority overlooks a key distinction between the New York home visits and those carried out by the County of San Diego, namely, that the Project 100% home visits have only a minimal, if any, rehabilitative function. The record reveals that the program is operated *exclusively* by the District Attorney's Public Assistance Fraud Di-

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[1] There is no dispute that the investigators make referrals for criminal investigation if they discover evidence of contraband, child abuse or a subject with outstanding felony warrants. On occasion, the investigators even arrange for arrests. [ER 85, Ex.7:107-08] The majority's attempt to view the fraud investigators' duty to report evidence of welfare fraud or other crimes as distinct from any "affirmative" requirement on the part of Project 100% is unavailing. *See* Maj. Op. at 921 - 922 n. 7. By utilizing sworn peace officers from the district attorney's office to conduct the home visits-rather than social workers from the County's welfare agency-Project 100% necessarily requires the investigators to look for and report evidence of fraud and other crimes.

vision, which is the County's Special Investigative Unit (SIU), as an "early fraud prevention *and detection* program;" the County's welfare agency does not exercise any supervisory responsibility over the program. [ER 85, Ex. 14:156 (Reid Depo)]. Thus, whereas in *Wyman* the home visits were conducted by social workers who had "profound responsibility" for the aid recipient, *Wyman*, 400 U.S. at 323, 91 S. Ct. 381, here the visits are conducted by agents of the district attorney charged only with verifying welfare eligibility and detecting fraud using investigative techniques.[2] [ER 85, Ex.

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[2] As peace officers under California Penal Code § 30.35, these fraud investigators have received training at law enforcement academies in interrogation techniques and arrest-and-control procedures. [ER 85, Ex. 5,2,7,8] According to Frank Reid, a supervising investigator for the San Diego County District Attorney, the investigators identify themselves to applicants by showing either a metal badge or folding identification card with the District Attorney logo, the District Attorney's name and the investigator's name, photograph and badge number.[ER 85, Ex. 14:36-37] The majority's reliance on *New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987), to dismiss this differentiating aspect of the Project 100% home visits is misguided. *See* Maj. Op. at 924 n. 11. First, *Burger* did not address *home visits* by sworn peace officers, but rather whether warrantless searches by police officers of automobile junkyards (conducted pursuant to a statute authorizing them) fell within the exception to the warrant requirement for administrative inspections of "closely regulated" businesses. 482 U.S. at 693, 699-703, 107 S. Ct. 2636. The Court held that these searches were exempted, in part because "an operator of a junkyard engaging in vehicle dismantling has a reduced expectation of privacy in this 'closely regulated' business." *Id.* at 707, 107 S. Ct. 2636. Moreover, although *Burger* upheld the regulatory scheme against a Fourth Amendment challenge, the Court explicitly stated that both the inspections and the overall scheme were, as the majority itself recognizes, "*properly administrative.*" *See Burger*, 482 U.S. at 717, 107 S. Ct. 2636 ("*So long as a regulatory scheme is properly administrative*, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself.") (emphasis added); *see also id.* at 693, 107 S. Ct. 2636 ("The case also presents the question whether an *otherwise proper administrative inspection* is unconstitutional . . . ."); *id.* at 716, 107 S. Ct. 2636 ("The discovery of evidence of crimes in the course of an

5, 7, 8, 9, 14] Unlike in *Wyman*, these fraud investigators do not interview the applicant inside the home to discuss "any changes in [the applicant's] situation that might affect her eligibility . . . [or] the amount of [her] assistance, and [whether] there are any social services which the Department of Social Services can provide to the family." *Wyman*, 400 U.S. at 314, 91 S. Ct. 381 (quoting a letter from the New York City Department of Social Services describing the home visit's "purpose"). Quite the contrary, the County's fraud investigators are trained *not* to give advice to applicants because their focus is "highly limited" to legal compliance.[3] [ER 85, Ex.1:170] According to the defendants themselves, the program's objective is not to assist the needy, but to "increase welfare fraud prevention efforts and to increase program integrity."[4] [ER 86, Ex. 48:14 (Answer 64)] Thus, that the fraud investigators are not *exclusively* engaged

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otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect.") (emphases added). Unlike in *Wyman*, the record here demonstrates that neither the home visits as conducted nor the program as implemented are "properly administrative," so *Burger* is inapposite.

[3] For example, according to the defendants, if the home visit reveals information that an applicant may have received CalWORKS benefits in the past for which the applicant was not entitled, the fraud investigator refers the case to the District Attorney's "full-field" division for criminal investigation and possible prosecution. [ER 85, Ex.7:105-06]

[4] Although the majority is correct that the federal welfare laws are the "same background against which San Diego's welfare program is administered," Maj. Op. at 921 n. 6, this does not demonstrate that the purpose of the *Project 100% home visits* is to provide "financial assistance and rehabilitation and other services . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life," which was the case in *Wyman*. 400 U.S. at 315, 91 S. Ct. 381 (ellipses in original) (citation and internal quotation marks omitted). Indeed, the record in this case is to the contrary. I therefore cannot agree with the majority's bald assertion that there is "no greater showing of a rehabilitative purpose than there is in this case." Maj. Op. at 921 n. 6.

in a criminal investigation does not alter an important purpose of the home visits, which is to investigate and detect welfare fraud.[5]

Indeed, *Wyman* concluded that New York's home visit was not "in aid of any criminal proceeding" in part because it viewed the possibility of the caseworker visit leading to the discovery of fraud and a subsequent criminal prosecution as purely speculative. 400 U.S. at 323, 91 S. Ct. 381 (explaining that "if the visit should, *by chance*, lead to the discovery of fraud and a criminal prosecution should follow, then . . . that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct"). Of course, Project 100% is not a program in which there is some remote "chance" that a caseworker trying to help a needy applicant will stumble upon evidence of criminal activity. Instead, the County's program requires fraud investigators with no expertise in social work and no object of rehabilitating the applicant to detect and report evidence of welfare fraud and other crimes. Inexplicably, the majority sees little difference between the two. Indeed, despite acknowledging that fraud investigators "do make referrals for criminal investigation," Maj. Op. at 919 n. 3, the majority curiously concludes that the visits are nonetheless "intended, and in fact used, *only* as

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[5] The majority's suggestion that I have mischaracterized the underlying purpose of the Project 100% home visit itself misreads the record in this case and misconstrues *Wyman*. I do not suggest that the underlying purpose of Project 100% is to investigate crimes other than welfare fraud, nor do I dispute that the home visit in *Wyman* was not a criminal investigation, did not "equate with a criminal investigation," and was not "in aid of any criminal proceeding." *Wyman*, 400 U.S. at 323, 91 S. Ct. 381. However, given the scope of the fraud investigators' duties and responsibilities-that they are charged not only with verifying eligibility but also with detecting welfare fraud and reporting evidence of other crimes-the same cannot be said of the home visits conducted by the County of San Diego.

an eligibility verification tool." Maj. Op. at 924 n. 12 (emphasis added). The County's assertion to the contrary—which the majority itself accepts—belies any such conclusion.[6]

Finally, it is far from clear that Project 100% forbids "snooping," as was the case in *Wyman*, 400 U.S. at 321, 91 S. Ct. 381. When walking through the welfare applicant's home, a fraud investigator may request to look at the contents of bedrooms, closets, kitchens, bathrooms, medicine cabinets and drawers in search of evidence of ineligibility or fraud. The majority reasons that because consent is required, the investigator's activity "cannot fairly be characterized as 'snooping.'" Maj. Op. at 924 - 925 n. 13. But obtaining consent to snoop cannot change the nature of the ensuing conduct—*snooping*—any more than obtaining consent to search changes the nature of the *search* that follows. The question is whether looking in medicine cabinets, laundry baskets, closets and drawers for evidence of welfare fraud—even with consent—constitutes snooping. I doubt my colleagues in the majority would disagree that an IRS auditor's asking to look in such places within their own homes to verify the

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[6] The majority finds comfort in the lack of evidence that applicants have ever been prosecuted for welfare fraud as a result of inconsistencies discovered during the visit. Maj. Op. at 924 n. 12. In light of the County's concession that the visits can and do lead to prosecutions for *other crimes*-including past welfare fraud-I fail to see why it follows from the lack of prosecutions for current or attempted welfare fraud that the home visit does not rise to the level of a traditional Fourth Amendment search. It is clear that the home visits remain primarily *investigative*, notwithstanding that the County may not prosecute applicants for discrepancies in their applications. Moreover, that the home visits have not led to prosecutions for current welfare fraud might reflect that welfare applicants generally are not trying to cheat the government out of scarce public resources; or that many innocent and impoverished people are not committing welfare fraud and instead are having their privacy invaded; or that the fraud investigators are in fact interested mostly in discovering other types of crimes.

number of dependents living at home would constitute snooping.

Far from having "direct application," Maj. Op. at 922 n. 8, *Wyman* is factually distinguishable from the case at bar, and does not preclude our holding that the home visits carried out by the County of San Diego are unreasonable searches under the Fourth Amendment.[7]

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[7] The majority suggests that the Seventh Circuit's decision in *S.L. v. Whitburn*, 67 F.3d 1299 (7th Cir. 1995), supports its application of *Wyman* to the facts of this case. Maj. Op. at 921 n. 5. But the home visits in *Whitburn* are also distinguishable from those at issue here. First, the Milwaukee County Department of Social Services administered the home visit program through field representatives of a private investigative service whose only purpose was to verify eligibility. Law enforcement agents do not appear to have played any role in the visits. *Whitburn*, 67 F.3d at 1302. Second, the home visits were not required of all first-time applicants. Rather, a caseworker would refer an applicant's case to the investigative service only if he or she determined that the application needed further verification, and such verification "*could* include a home visit," though one was not necessarily required. *Id.* (emphasis added). Third, although the home visits also required consent, the field representatives were prohibited from telling applicants that their benefits would be cut off if they refused to consent to the visit, thus lessening any concerns of coercion. *Id.* at 1308. By contrast, the County explicitly informs applicants through the Project 100% application packet, in posted notices and through an orientation video that the home visit *must* be completed before aid will be granted. ER 81, Ex. 11; ER 85, Ex. 23:1. Finally, unlike the case before us, *Whitburn* noted that "[t]here is no evidence or reason to believe that an applicant who declines the home visit will be denied benefits *even if satisfactory verification of eligibility is provided by some other means.*" *Id.* at 1308 (emphasis added). Under Project 100%, the home visit must occur regardless of whether the information is available elsewhere, and as the County concedes, an applicant's refusal to consent to a walk-through nearly always will result in a denial of benefits. *See* Maj. Op. at 919.

II.

The Supreme Court has long held that a "Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 U.S. at 33, 121 S. Ct. 2038 (citing *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)).[8] "This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to *administrative inspections designed to enforce regulatory statutes.*" *Burger*, 482 U.S. at 699, 107 S. Ct. 2636 (emphasis added). Of course, this focus on subjective expectations might lead one to conclude that a welfare applicant destroys any such privacy expectation when she seeks aid from the government that is conditioned upon a home visit. *See also United States v. Scott*, 450 F.3d 863, 867 (9th Cir. 2006). But as we made clear in *Scott:*

> the Supreme Court has resisted this logic, recognizing the slippery-slope potential of the *Katz* doctrine:
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> "If the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes . . . In such cir-

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[8] I disagree with the majority's contention that *Kyllo* is inapposite because it involved a "classic criminal law enforcement investigation conducted without the homeowner's consent." Maj. Op. at 927 n. 14. Notwithstanding the majority's attempt to read *Kyllo* narrowly, the Court there reaffirmed a core Fourth Amendment principle, namely "the right of a man to retreat into his own home and there be free from unreasonable *governmental intrusion.*" 533 U.S. at 31, 121 S. Ct. 2038 (emphasis added).

> cumstances, where an individual's subjective expectations had been 'conditioned' by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a 'legitimate expectation of privacy' existed in such cases, a normative inquiry would be proper."

Id. (quoting *Smith v. Maryland*, 442 U.S. 735, 740 n. 5, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979)). Here, we must decide whether welfare applicants continue to have a legitimate expectation of privacy in their homes even after consenting to a home visit. The answer to that question necessarily requires that we examine whether the home visit was a reasonable search.

We explained in *Scott* that assent to a search "is merely a relevant factor in determining how strong [the individual's] expectation of privacy is." *Id.* at *9. Indeed, we have held that even convicted criminals—a group more readily subject to restrictions than welfare applicants—"do not waive their Fourth Amendment rights by agreeing, as a condition of probation, to 'submit [their] person and property to search at any time upon request by a law enforcement officer.'" *Id.* at *10 (quoting *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 261 (9th Cir. 1975) (en banc)). Thus, the applicant's consent to the home visit is valid only if, taking the fact of consent into account, the visit was a reasonable search. *Id.*

The majority concludes that the Project 100% home visits, even if considered searches, were reasonable under both the Supreme Court's decision in *Wyman* and its subsequent line of "special needs" cases. Respectfully, I disagree. Neither *Wyman* nor the special needs doctrine renders constitu-

tional the entry and inspection of homes under Project 100% by agents of the district attorney without warrants, probable cause or individualized suspicion of ineligibility or fraud.

A.

In holding that the Project 100% home visits are reasonable, the majority observes that, as in *Wyman*, they occur with advance notice, the applicant's consent and serve the "important governmental interests of verifying an applicant's eligibility for welfare benefits and preventing fraud." Maj. Op. at 923.[9] But even assuming that the County adequately apprises the applicants of the scope of the walk-through, the similarities between the two programs end there.[10]

The visits in *Wyman* were designed primarily to promote recipients' "personal, rehabilitative orientation." 400 U.S. at 320, 91 S. Ct. 381. The Court emphasized that the visits did not focus on ferreting out ineligible recipients, but rather on

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[9] The majority also asserts that the visits "alleviate the serious administrative difficulties associated with welfare eligibility verification," but does not explain how such alleviation occurs. Maj. Op. at 925.

[10] Although the applicants are informed that the fraud investigators will visit their homes to "verify" and "check" information, it is hardly clear that they are given notice that the agents will perform a walk-through of the home and seek access to its most intimate parts in the course of their duties. For example, the CalWORKS application package contains a document titled "Notice to All CalWORKS Applicants—Home Call Verification," which states: "A Fraud Investigator with the District Attorney's Office will come to your home *to verify the facts related to your application* for public assistance. The Fraud Investigator may also make other contacts. County policy requires that a home call be completed *to verify information given* by all new applicants *prior* to granting ongoing CalWORKS . . . . The final eligibility determination will be made by the Eligibility Technician assigned to your case after the Fraud Investigator has completed their investigation." (Emphasis added.) [ER 81, Ex.11]

"restoring the aid recipient 'to a condition of self-support,' and [on] the relief of his distress." *Id.* at 319, 91 S. Ct. 381. By contrast, Project 100% is exclusively concerned with fraud and legal compliance and thus employs agents of the district attorney to conduct walk-through inspections of all applicants' homes in search of evidence of ineligibility, fraud and other crimes.

The majority's holding extends *Wyman* to a radically different set of facts. If the Project 100% home visits are constitutional, it is only because they are justified under the special needs doctrine, and in my view, they are not.

B.

The Supreme Court has relaxed the Fourth Amendment's warrant requirement "when 'special needs, *beyond the normal need for law enforcement*,' make [it] impracticable." *Griffin*, 483 U.S. at 873, 107 S. Ct. 3164 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (Blackmun, J., concurring in the judgment)) (emphasis added). The special needs cases make clear that courts must focus on the "primary" or "ultimate" purposes of the search in question to determine whether the purported need is beyond the normal need for law enforcement. *See, e.g.*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 38, 41, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) (invalidating a roadside checkpoint program aimed at enforcing drug laws through drug-sniffing dogs and visual inspection of cars, because its "primary purpose was to detect evidence of ordinary criminal wrongdoing"); *Ferguson v. City of Charleston*, 532 U.S. 67, 81, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001) (invalidating a state hospital's practice of testing pregnant women for cocaine and providing the results to the police, because the "ultimate purpose" of the testing program—the "beneficent" goal of "protecting the health of

both mother and child"—"'is ultimately indistinguishable from the general interest in crime control.'" (quoting *Edmond*, 531 U.S. at 44, 121 S. Ct. 447)). Thus, where the Court has upheld suspicionless drug testing programs, it has concluded that "the 'special need' . . . was one divorced from the State's general interest in law enforcement." *Ferguson*, 532 U.S. at 79, 121 S. Ct. 1281; *see also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (upholding the drug testing of railroad personnel involved in train accidents to ensure public safety); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989) (upholding the drug testing of federal customs officers who carry arms or are involved in drug interdiction to ensure that they "are physically fit, and have unimpeachable integrity and judgment"); *Vernonia*, 515 U.S. at 664-65, 115 S. Ct. 2386 (upholding the drug testing of high school student athletes to prevent drug addiction among students and maintain order in schools).

Assuming that the County's need to verify eligibility and prevent welfare fraud is the primary purpose of the Project 100% home visit, I agree with the majority that the County has articulated a valid "special need" beyond ordinary law enforcement concerns. *Cf. Scott*, 450 F.3d at 870 (explaining that the government's need to ensure that pre-trial releasees appear in court "implicates the efficient functioning and integrity of the judicial system," which is "a purpose separate from the general interest in crime control"). The question is whether the County's need is "important enough to override the [welfare applicant's] acknowledged privacy interest" in the home and "sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Chandler*, 520 U.S. at 318, 117 S. Ct. 1295. To balance the home visit's intrusion on the applicant's Fourth Amendment interests against its promotion of legitimate

governmental interests, we must consider: (1) the nature of the privacy interest upon which the search intrudes; (2) the character of the intrusion; and (3) the importance of the government interest at stake and the efficacy of the policy in meeting it. *See Bd. of Educ. v. Earls*, 536 U.S. 822, 830-34, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002).

In this case, the nature of the privacy interest is at its "zenith," *Scott*, 450 F.3d at 871, because the search involves the home, and warrantless searches of the home are "presumptively unreasonable." *Payton*, 445 U.S. at 586, 100 S. Ct. 1371; *see also Kyllo*, 533 U.S. at 31, 121 S. Ct. 2038 ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."). Although the majority acknowledges that the Appellants' privacy interest is "significant," it explains that "a person's relationship with the state can reduce [the] expectation of privacy even within the sanctity of the home." Maj. Op. at 927. To support this conclusion and thereby circumvent the presumption of unreasonableness, the majority again erroneously relies on *Griffin*.

Griffin held that a state's operation of its probation system was a special need that justified the warrantless search of a probationer's home. Importantly, *Griffin* noted that "[p]robation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty." 483 U.S. at 874, 107 S. Ct. 3164 (internal quotation marks and citation omitted). The Court then explained that as *convicted criminals*, probationers "do not enjoy the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions." *Id.* (internal quotation marks and citation omitted). Griffin's status as a felon on probationary release played a crucial part in the Court's decision to permit the warrantless home search at issue there:

These restrictions are meant to assure that the probation serves as a

> period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. These same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed . . . . Supervision, then, is a "special need" of the State permitting a degree of impingement upon privacy *that would not be constitutional if applied to the public at large.*

Id. at 875, 107 S. Ct. 3164 (internal citation omitted) (emphasis added). In *Ferguson*, the Supreme Court confirmed that "*Griffin* is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large." 532 U.S. at 79-80 n. 15, 121 S. Ct. 1281.

Of course, unlike convicted felons, welfare applicants have no lesser expectation of privacy in their homes than the rest of us. *See also Scott*, 450 F.3d at 872 (distinguishing *Griffin* in a case involving warrantless drug testing of pretrial releasees, because in contrast to probationers, "[p]eople released pending trial . . . have suffered no judicial abridgment of their constitutional rights"). In this case, the Appellants have committed no wrong and the defendants have all but disclaimed any rehabilitative or supervisory purpose in Project 100%. *See Vernonia*, 515 U.S. at 654, 115 S. Ct. 2386 (confirming that it is the "supervisory relationship between probationer and State [that] justifies 'a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large'") (quoting *Griffin*, 483 U.S. at 875, 107 S. Ct. 3164). *Griffin*, standing alone, does not provide a basis to conclude that welfare ap-

plicants have a reduced expectation of privacy because of their relationship with the state.[11]

Nor do the Supreme Court's more recent cases lend themselves to such a conclusion. *Vernonia*, for example, held that student athletes have reduced privacy expectations because of the schools' "custodial and tutelary responsibility for children," the "element of communal undress inherent in athletic participation" and because student athletes "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." 515 U.S. at 656-57, 115 S. Ct. 2386 (internal quotation marks and citations omitted). Although the Court cited *Griffin* when it stated that "the legitimacy of certain privacy expectations vis-à-vis the State *may* depend upon the individual's legal relationship with the State," *Vernonia*, 515 U.S. at 654, 115 S. Ct. 2386 (emphasis added), it also emphasized that "the fact that the [students] are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster" was "[c]entral" to its holding. *Id.* Whatever legal relationship exists between the fraud investigator and the welfare applicant is wholly distinguishable from the relationship between a student and school administrators, *id.* at 656-57, 115 S. Ct. 2386, a probationer and his probation officer, *Griffin*, 483 U.S. at 874-75, 107 S. Ct. 3164, or the government as employer and its employees, *Von Raab*, 489 U.S. at 670-71, 109 S. Ct. 1384. Moreover, *Vernonia* confirmed that the legitimacy of a person's subjective expectation of privacy "varies . . . with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car or in a public park." 515 U.S. at 654, 115 S. Ct. 2386.

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[11] *Griffin* appears to be the only case in which "special needs" permitted a warrantless entry and search of anyone's home.

With the exception of convicted felons, neither we nor the Supreme Court has ever held that an individual's privacy expectation *in the home* was reduced to a level of unreasonableness as a result of their relationship with the state. But the majority today concludes that "it is reasonable for welfare applicants who desire direct cash governmental aid to undergo eligibility verification through home visits." Maj. Op. at 927. Even if that broad statement is true, it does not follow that it is reasonable for a fraud investigator to conduct an intrusive walk-through of the home and look through its most private locations in search of evidence of welfare fraud, particularly if the applicant had no knowledge of the scope of the visit in the first place. I do not disagree that the Fourth Amendment permits some degree of intrusion in the home to *verify welfare eligibility*, so long as it is truly comparable to the limited home visit interview program at issue in *Wyman*. But walk-throughs and fraud investigations of the sort conducted here far exceed what is permissible. Society, I should think, is willing to recognize as reasonable a welfare applicant's privacy expectation that the most intimate locations of the home will be free from the government's prying eyes, even when he or she consents to a vaguely described home visit to "verify" or "check" information provided in an application for welfare benefits. *See Kyllo*, 533 U.S. at 27, 121 S. Ct. 2038. Thus, notwithstanding the welfare applicant's need for government aid, his or her relationship with the state falls far short of reducing the expectation of privacy in the home.[12] *See also Scott*, 450 F.3d at 872 (distinguishing *Grif-*

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[12] The majority's conclusion to the contrary seems limitless and risks eroding the Fourth Amendment rights of various groups of people in this country. The government is a provider of countless benefits and services, many of which require verification of eligibility-such as disability benefits, Medicare and Medicaid benefits, veterans benefits, student financial aid grants and lunch subsidies for school students. If the majority is correct that a person's expectation of privacy in the home is reduced any time he or she has a relationship with the state that requires an eligibility determination, then there seems little to prevent the government from

fin to hold that to the extent a pre-trial releasee's assent to warrantless searches "decreased his reasonable expectation of privacy . . . the decrease was insufficient to eliminate his expectation of privacy in his home").

The majority next concludes that the intrusion on privacy is also "reduced" as a result of the procedures used in conducting the home visit and because the applicant must consent to it. Of course, the cost to the applicant of refusing consent is a denial of welfare benefits, and we have rejected the notion that the waiver of constitutional rights in exchange for government benefits is always permissible. *Scott*, 450 F.3d at 866 (stating that "our constitutional law has not adopted this philosophy wholesale"). The "unconstitutional conditions" doctrine limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary:

> [W]e live in an age when government influence and control are pervasive in many aspects of our daily lives. Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections. Where a constitutional right "functions to preserve spheres of autonomy . . . [u]nconstitutional conditions doctrine protects that [sphere] by preventing governmental end-runs around the barriers to direct commands."

Id. (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1492 (1989)).[13] The question

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implementing a home visit program similar to Project 100% with respect to these beneficiaries as well.

[13] As the majority notes, Maj. Op. at 927 n. 15, *Scott* cited *Wyman* in dictum for the proposition that "government may sometimes condition

here is whether the applicant's option to withdraw his or her consent and terminate the visit permissibly serves to reduce the nature of the intrusion on the applicant's privacy.

In the context of welfare benefits, where government aid is an important means of providing food, shelter and clothing to a family, the coercive nature of the home visit renders the notion of consent effectively meaningless. Although *Wyman* stated that "nothing of constitutional magnitude is involved" when a welfare aid recipient's benefits are terminated as a consequence of the plaintiff's refusal to undergo a home visit, 400 U.S. at 324, 91 S. Ct. 381, the Court there was not faced with a situation in which coercion may have played a role. Indeed, *Wyman's* statement that the plaintiff's "choice is entirely hers" suggests that the Court did not believe coercion was an issue at all. *Id.* Yet the Court has made clear since *Wyman* that the Fourth Amendment requires that consensual searches be voluntary and uncoerced. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 222-27, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Under the circumstances of this case, one cannot reasonably expect an individual who has made the difficult-and often desperate-decision to apply for welfare aid to then deny consent to a mandatory home visit when the consequence is denial of the application. Where such coercion is present, the option to refuse the home visit

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benefits on waiver of Fourth Amendment rights-for instance when . . . paying welfare benefits." *Scott*, 450 F.3d at 868. However, as shown above, *Wyman* did not permit the wholesale conditioning of welfare benefits on waiver of Fourth Amendment rights *any time* the government pays them. Rather, *Wyman* held that the home visits "*as structured by the New York statutes and regulations* " did not amount to an "unwarranted invasion of personal privacy." 400 U.S. at 326, 91 S. Ct. 381 (emphasis added). Neither *Wyman* nor *Scott* forecloses the conclusion that the Project 100% home visits are unconstitutional even though consent is given. Instead, "consent to any search is valid only if the search in question (taking the fact of consent into account) was reasonable." *Scott*, 450 F.3d at 868.

or the walk-through cannot reduce the intrusion on the applicant's privacy any more than it can reduce the applicant's privacy expectation in the home.

The majority finally concludes that the visits are "an effective method of verifying eligibility for benefits" and "provide an important deterrent effect." Maj. Op. at 928. Even assuming that to be true-a point the Appellants dispute-and given that warrantless searches of the home are "presumptively unreasonable," *Payton*, 445 U.S. at 586, 100 S. Ct. 1371, I cannot agree that these interests are "important enough to override the individual's acknowledged privacy interest" in the home or are "sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion," *Chandler*, 520 U.S. at 318, 117 S. Ct. 1295. "[T]he Fourth Amendment draws a firm line at the entrance to the house," *Kyllo*, 533 U.S. at 40, 121 S. Ct. 2038 (internal quotation marks omitted), and the County's home visits unreasonably cross it. Absent probable cause or at least a reasonable suspicion to believe an applicant has been less than truthful in his or her application, the Fourth Amendment prohibits the Project 100% home visits as they are conducted in this case. The majority errs in validating them as reasonable under the special needs doctrine.

III.

Because the home visits are unreasonable under the Fourth Amendment, they also violate the California constitutional right against unreasonable searches and the right to privacy. *See Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 26 Cal. Rptr. 2d 834, 865 P.2d 633, 650 (1994) ("Under the Fourth Amendment and the parallel search and seizure clause of the California Constitution (art. I, § 13), the reasonableness of particular searches and seizures is determined by a general balancing test weighing the gravity of the

governmental interest or public concern served and the degree to which the [challenged government conduct] advances that concern against the intrusiveness of the interference with individual liberty." (internal quotation marks omitted)); *In re York*, 9 Cal. 4th 1133, 40 Cal. Rptr. 2d 308, 892 P.2d 804, 813 (1995) (observing that the Article I § 1 privacy clause of the California Constitution does not establish broader protection than that provided by the Fourth Amendment or Article I § 13 of the California Constitution).

In addition, the Project 100% home visits violate the California unconstitutional conditions doctrine, for two reasons. First, the County has not established that the value to the public of its unreasonable home visit program "manifestly outweighs" the impairment of the welfare applicants' constitutional rights. *See Robbins v. Superior Court*, 38 Cal. 3d 199, 211 Cal. Rptr. 398, 695 P.2d 695, 704 (1985). Second, the County has not shown that "there are no available alternative means that could maintain the integrity of the benefits program without severely restricting a constitutional right." *Id.*

The majority avoids this analysis altogether, reasoning that the County has not conditioned the receipt of welfare benefits upon the waiver of a constitutional right, because the home visits are reasonable, and the California and federal constitutions only create a right to be free from *unreasonable* searches. Maj. Op. at 931. Of course, the majority's reasonableness holding is based in large part on its faith in the fraud investigators obtaining consent before entering the home or looking within it. But as I have explained, given the coercive nature of the home visit, the applicant's consent should not weigh in favor of holding the visit reasonable.

Project 100% clearly makes the price of welfare assistance the waiver of both federal and state constitutional

rights, with consent being coerced by the threat of denial of benefits. This is precisely the sort of conditioning of benefits that California's unconstitutional conditions doctrine forbids.[14]

IV.

In *Scott*, we held that police may not conduct a search based on less than probable cause of an individual released while awaiting trial. The majority has tried to explain why those in need of public assistance to provide food, shelter and medical care for themselves and their families have less protection under the Fourth Amendment than those charged with a crime. I am not convinced.

Wyman does not support the majority's unprecedented conclusion that no search occurs under the Fourth Amendment when a district attorney fraud investigator roams through a welfare applicant's home, scrutinizing the most intimate and private of places, looking for evidence of ineligibility, fraud and crimes wholly unrelated to the welfare application. Because the County's home visits violate the Fourth Amendment under both *Wyman* and the special needs cases, they also violate the California right against unreasonable searches, the right to privacy and the unconstitutional conditions doctrine. Although I concur in the majority's holding that the state regulation prohibiting "[m]ass and indiscriminate home visits" is inapplicable to Project 100%, *see* MPP § 20-007.33, I respectfully dissent from the remainder of the majority's opinion.

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[14] I agree with the majority that MPP § 20-007.33, the regulation prohibiting "[m]ass or indiscriminate home visits," applies only to Special Investigative Units conducting for-cause investigations and therefore does not apply to this case.

APPENDIX B

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF
CALIFORNIA
s/ [illegible]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROCIO SANCHEZ, et al., Plaintiffs, vs. COUNTY OF SAN DIEGO, et al., Defendants.	CASE NO. 00 CV 1467 JM(JFS) RULINGS ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs have filed this class action suit challenging the lawfulness of the County of San Diego's welfare eligibility program, Project 100%, which requires welfare applicants to consent to a home visit as a condition of eligibility. Plaintiffs argue that the manner in which home visits are carried out under Project 100%, as well as the fact that benefits are

conditioned on consent to a home visit, violates their rights as established by the constitutions of the United States and California, as well as by federal and state statutes and regulations.[1] Consequently, the primary constitutional issue under both the United States and California constitutions is whether the government may condition the receipt of public aid upon consent to a government employee's entry into the home in order to verify eligibility for public aid. Plaintiffs seek a declaration that Project 100% is unlawful and to be enjoined (see Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, 25: 15). The parties have filed cross-motions for summary judgment on all claims. Pursuant to Local Rule 7.1(d)(1), the court finds these motions appropriate for decision without oral argument.

II. BACKGROUND

In 1996, Congress enacted welfare reform legislation known as the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996." 42 U.S.C. § 601 et seq. This legislation replaced the Aid to Families with

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[1] Plaintiffs allege the following claims in their first amended complaint: (1) unreasonable searches and seizures (Fourth and Fourteenth Amendments; 42 U.S.C. § 1983; Cal. Const. Art. 1 § 13); (2) deprivation of property without due process (Fourteenth Amendment; 42 U.S.C. § 1983; Cal. Const. Art. 1 § 7); (3) violation of right to privacy (Cal. Const. Art. 1); (4) unconstitutional condition for receipt of benefits under California Constitution; (5) unlawful imposition of new eligibility criteria for welfare benefits (7 C.F.R. §§ 273.2(f)(4)(i), (iii); 45 C.F.R. § 205.100; Cal. Welf. & Inst. Code §§ 10600, 11207, 11209, 11250; MPP §§ 40-161, 63-300.543); (6) unlawful elicitation of unnecessary information (7 C.F.R. § 273.2; Cal. Welf. & Inst. Code § 10500; MPP § 40-101.12, 40-126.31); (7) failure to limit fraud investigation referrals (Cal. Welf. & Inst. Code §§ 1055.5(d)(6), 11055.5(d)(7)); (8) unlawful mass and indiscriminate home visits (MPP §§ 20-007.33; 40-161); (9) violation of confidentiality (7 C.F.R. § 273.2(f)(5)(ii); Cal. Welf. & Inst. Code § 10850; MPP §§ 19-007, 40-101.13, and 40-157.22).

Dependent Children program ("AFDC") and had as its purpose the transition of individuals from welfare to work.

Pursuant to the federal legislation, California adopted the Welfare to Work Act of 1997 and established CalWORKs (California Work Opportunity and Responsibility to Kids). Cal. Welf. & Inst. Code § 11200 et seq. Like the former state AFDC, CalWORKs is funded in part by its federal counterpart (42 U.S.C. § 601 et seq.) now known as Temporary Assistance for Needy Families ("TANF"). Cal. Welf. & Inst. Code §§ 10100-10101, 11200.5.

California counties are responsible for administering the CalWORKs program in conformity with federal and state laws and regulations. Cal. Welf. & Inst. Code §§ 10802, 11209. Both federal and state law encourage the implementation of procedures to detect and prevent fraud and abuse in the CalWORKs program. 42 U.S.C. § 602(a)(6); Cal. Welf. & Inst. Code § 11055.5. To this end, San Diego County has established Project 100%.

The parties are in essential agreement as to the structure and operation of Project 100%. San Diego County residents who submit joint applications for food stamps and cash aid under CalWORKs and who are not suspected of fraud or ineligibility are automatically enrolled in San Diego County's Project 100%. Under Project 100%, all applicants receive a home visit from an investigator. The home visit includes a "walk through," infra, to gather eligibility information that will then be turned over to eligibility technicians who compare that information to information supplied by the applicant. Specifically, the investigator is to view items that confirm (1) the amount of assets claimed by the applicant; (2) the applicant has an eligible child; (3) that applicant lives in California; and (4) an absent parent does not live at the residence. The home visits are conducted by investigators from the Public Assistance Fraud Division

(PAFD), part of the district attorney's office, who are sworn peace officers with badges and photo identification identifying them as investigators from the district attorney's office. The investigators wear plain clothes and do not carry weapons.

Applicants are informed during the application process that they will be visited by a county official in order to verify the information provided by the applicant. Applicants are also informed during the application process that a home visit must be completed prior to aid being granted, but are not informed that the visit will occur, as it generally does, within ten days of the application being submitted.

The actual home visit consists of two parts, an interview of the applicant regarding information submitted during the intake process by the applicant and a "walk through" of the home. The home visit takes anywhere from fifteen minutes to an hour with five to ten minutes generally allocated to a walk through. If the applicant refuses to allow a home visit, then the investigator immediately terminates the visit and reports that the applicant failed to cooperate. This results in a denial of benefits.[2] The denial of aid is the only consequence of refusing to allow the home visit; no criminal penalties are imposed for not consenting. Additionally, when an applicant is not home, the investigator will leave a card asking the applicant to call the number indicated to schedule an appointment and will visit the residence a second time if no appointment is made.[3] If after the second visit, the applicant fails to call the investigator to schedule an appointment, this information is reported to the responsible eligibility

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[2] It is unclear based on the evidence submitted if refusing to allow the walk through portion of the home visit will result in a denial of benefits. Bunton Decl., Ex. 24. However, defendants' answer admits that refusal to allow a walk through will result in the denial of benefits.

[3] If the applicant is homeless, obviously no home visit is made.

technician who then denies the application. The home visit is conducted during normal working hours.

The "walk through" portion of the home visit is conducted by the investigator only after consent by the applicant has been given. The applicant is asked to lead the "walk through;" the investigator does not walk through the residence unescorted. The investigator looks for items in plain view and may ask to view items in closets, cabinets, laundry baskets, trash cans, etc. but will only do so if permission is granted by the applicant to look in such areas.

In addition to conducting the home visit, applicants are informed that investigators may make "collateral contacts" (e.g., the applicant's neighbors, landlord, or apartment manager) in order to verify information. When contacting a third party for verification information, the investigator will show photo identification that states he or she is a public assistance investigator with the district attorney's office. The investigator then informs the contact that he or she seeks information about the applicant. The collateral contact is not told that the applicant has applied for CALWORKs benefits and a third party's refusal to provide information will not affect eligibility if eligibility can be confirmed in another manner.

III. DISCUSSION

A. Legal Standards on Summary Judgment

Entry of summary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the adverse party bears the burden of proof at trial, the moving party may point to the lack of evidence to support the alleged claims such that the party bearing the burden of proof may not rest on mere allegations or denials of the

moving party's pleadings but must produce evidence to show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Celotex Corp., 477 U.S. at 322-23; Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc) (citations omitted). Additionally, the court may not assess the credibility of the witnesses at summary judgment and must draw all permissible inferences from the evidence in the nonmoving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Thus, a genuine issue of material fact exists, preventing summary judgment, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248.

B. Federal Law Claims

Does the Project 100% Home Visit Program Violate the Fourth Amendment?

The primary federal issue before the court is whether the Fourth Amendment is violated by conditioning the receipt of public aid, i.e., welfare benefits, on consent to entry by government officials into one's home for purposes of verifying eligibility for aid. After a careful review of the record, in light of the Supreme Court's holding in Wyman v. James, 400 U.S. 309 (1971) and its more recent "special needs" decisions, the court concludes that the home visits, even assuming that they are searches, are reasonable searches under the Fourth Amendment and therefore do not impose any unconstitutional condition upon the receipt of welfare benefits by plaintiffs. In reaching this conclusion, the court addresses (1) whether the home visits are searches, and (2) whether the home visits are ultimately reasonable given the nature of the intrusion and the government interest at stake.

The threshold inquiry into a Fourth Amendment violation claim focuses on whether the government conduct

constitutes a search or seizure within the meaning of Fourth Amendment jurisprudence. O'Connor v. Ortega, 480 U.S. 709, 711-12 (1987). In this case, the question is whether the home visits under Project 100% represent "searches" as defined by the Fourth Amendment.[4] On this point, the case of Wyman v. James, 400 U.S. 309 (1971), provides guidance.

In Wyman v. James, 400 U.S. 309 (1971), the Supreme Court addressed "whether a beneficiary of the program for Aid to Families with Dependent Children (AFDC) may refuse a home visit by the caseworker without risking the termination of benefits." Wyman v. James, 400 U.S. 309, 310 (1971). New York law required an applicant for welfare benefits to consent to entry into his or her home by a social worker in order to qualify for welfare benefits. Id. at 312. Upon consent to entry, the social worker would conduct an interview with the applicant in order to verify eligibility criteria and to ascertain the applicant's needs. The Court reasoned that even though the "immediate and natural reaction is one of concern about Fourth Amendment rights," due to official intrusion into the home, "[t]his natural and proper protective attitude, however, is not a factor in this case, for the seemingly obvious reason that we are not concerned here with any search ... in the Fourth

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[4] The Fourth Amendment provides

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. The Fourth Amendment applies to the states through its incorporation into the Fourteenth Amendment. Baker v. McCollan, 443 U.S. 137, 142 (1979).

Amendment meaning of that term." Id. at 316, 317. The Court gave the following reasoning to support this holding:

> It is true that the governing statute and regulations appear to make mandatory the initial home visit and the subsequent periodic "contacts" (which may include home visits) for the inception and continuance of aid. It is also true that the caseworker's posture in the home visit is perhaps, in a sense, both rehabilitative and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context. We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.

Id. at 317-18.

Notwithstanding plaintiffs' argument to the contrary, the court is unaware of any subsequent Supreme Court authority that undermines its holding in Wyman. Plaintiffs attempt to distinguish Wyman by focusing on the Court's later analysis of the rehabilitative aspects of the home visits in Wyman which they argue are not present here. However, that consideration goes to the reasonableness of any "search" caused by the home visit and not to whether the home visit is a "search" in the first place. The court concludes that the home visits at issue here sufficiently parallel those in Wyman to make this first holding of Wyman applicable to this case. The home visits are not investigations for evidence

of crime and have never resulted in criminal prosecution for welfare fraud. The home visit is neither forced nor compelled, and should a person refuse consent the welfare investigator would terminate the visit and not seek entry. Further, withholding consent is not a criminal act and only results in a denial of aid for an otherwise eligible applicant. As in Wyman, these facts lead the court to conclude that the home visits do not constitute "searches" under the Fourth Amendment.

However, even assuming a Project 100% home visit constitutes a search within the meaning of the Fourth Amendment, the search is reasonable under the holding in Wyman and subsequent "special needs" decisions by the Supreme Court. In Wyman, the Court reasoned that the home visit, even if considered a "search," was not proscribed by the Fourth Amendment "because it does not descend to the level of unreasonableness . . . which is the Fourth Amendment's standard." Wyman, 400 U.S. at 318. In support of this holding, the Court focused on the government's interest in conducting the home visit including the paramount needs of the child in receiving aid, the public trust held by the government to ensure public aid reaches the intended recipient, the government's duty and right to know how its funds are used, the rehabilitative aspect offered by the home visit, and its role as the "heart of welfare administration." Id. at 318-320. The Court found significant the means used to conduct the visit and emphasized that the applicant is given advance written notice of the visit,[5] forcible entry or entry under false pretenses is forbidden, visitation is done during working hours, and snooping in the home is forbidden. Id. 320-21. In addition, the Court rejected the argument that secondary sources of information

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[5] The Court did note, however, that the record contained affidavits of aid recipients stating that caseworkers "most often" come without notice. Wyman v. James, 400 U.S. 309, 321 n.8 (1971).

alleviated the need for an actual visit since such sources could not verify actual place of residence or physical presence in the home which were prerequisites for aid. Id. at 322. Furthermore, the Court emphasized that the home visit was not a criminal investigation and did not involve police or uniformed authority. Even if prosecution resulted because of information discovered during the home visit, the Court noted that this was merely a routine fact of life and did not change the non-criminal purpose of the home visit. Id. at 323. The Court also rejected the argument that a warrant should be required to conduct the home visit since requiring a warrant would ultimately allow greater intrusion into the applicant's privacy than the current regime. The Court went on to distinguish its holding from those in Camara v. Municipal Court, 387 U.S. 523 (1967), See v. City of Seattle, 387 U.S. 541 (1967), and Frank v. Maryland, 359 U.S. 360 (1959) where the Court had previously held "the Fourth Amendment barred prosecution for refusal to permit the desired warrantless inspection," into dwelling quarters and a commercial warehouse. Id. at 325. In Wyman, the Court reasoned that those cases involved a true search for violations and made refusal to consent a crime, unlike the home visit where refusal to permit entry merely resulted in the denial of aid. In sum, the Wyman court found that the home visit was a reasonable administrative tool, serving a valid administrative purpose, and was not an unwarranted invasion into privacy. Therefore, the Court held that the home visit "violate[d] no right guaranteed by the Fourth Amendment." Id. at 326.

Plaintiffs urge this court to narrowly construe the decision in Wyman v. James, 400 U.S. 309 (1971), but offer no binding authority or compelling argument for the court to do so.[6] Analysis, however, of the Supreme Court's more

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[6] Plaintiffs cite Blackwelder v. Safnauer, 689 F. Supp. 106, 140 (N.D.N.Y. 1988), and Reyes v. Edmunds, 472 F. Supp. 1218, 1224 (D.

recent decisions concerning the warrantless searches under the "special needs" doctrine is in order. The Supreme Court reiterated just last term that reasonableness "is the touchstone of the constitutionality of a governmental search." Bd. of Educ. v. Earls, 536 U.S. 822, 122 S. Ct. 2559, 2564 (2002). While courts generally require a warrant based on probable cause to conduct a search of a home, the Supreme Court has recognized an exception where "'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" Id. (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)). Supreme Court precedent has addressed a number of situations where the government has a "special need" outside the law enforcement context allowing suspicionless and/or warrantless searches. In Bd. of Educ. v. Earls, 122 S. Ct. 2559 (2002), the Court held a school district's policy of taking urine samples from students participating in extracurricular activities in order to prevent drug use among students implicated an administrative search that fell within the "special needs" doctrine. Earls, 122 S. Ct. at 2569. Similarly, in Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995), the Court found that the prevention of drug use among student athletes qualified as a special need justifying at-large drug testing of students seeking to participate in school athletics. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648-49 (1995). Beyond the public school context, the Court in O'Connor v. Ortega, 480 U.S. 709 (1987), reasoned that an administrative search of the work space of a state-employed psychiatrist, charged with workplace misconduct, fell within the Court's "special needs" jurisprudence. O'Connor v. Ortega, 480 U.S. 709, 725 (1987). The Court has also found a state's operation of its probation system "presents 'special needs' beyond normal law enforcement"

Minn. 1979) in support of their argument that the holding in Wyman v. James, 400 U.S. 309 (1971) should be limited to its facts.

in holding that a probation officer may conduct a warrantless search of a probationer's home on less than probable cause. Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987).[7] Where the "special needs" doctrine potentially applies, the court balances the nature of the privacy interest, the intrusion imposed on that interest by the government's action, and the immediacy and efficacy of the government's action in light of its need for the action as closer scrutiny of some of these cases indicates.

In Bd. of Educ. v. Earls, 536 U.S. 822, 122 S. Ct. 2559 (2002), the Tecumseh, Oklahoma school district adopted a policy of requiring students participating in extracurricular activities to submit to random, suspicionless drug testing of urine samples. At the outset, the Court noted that the Fourth Amendment, despite plaintiffs' arguments to the contrary, "imposes no irreducible requirement of individualized suspicion" Id. at 2564 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)). The Court considered the nature of the privacy interest at issue within the context of public education and reasoned that a student's privacy interest is limited in the public school environment because of the state's responsibility for maintaining discipline, health, and safety, especially in the areas of extracurricular activities. Id. at 2565. Additionally, the Court found the

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[7] In addition to the above cited cases, the Supreme Court has applied the "special needs" doctrine in a variety of contexts. See, e.g., Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (automobile checkpoints used to search for drunk drivers constitutional); Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989) (upholding drug testing of railroad personnel in order to deter future train accidents); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (no Fourth Amendment violation where government required drug testing of United States Customs employees seeking promotion to sensitive positions); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (automobile checkpoints used to search for illegal aliens constitutional).

degree of intrusion into the student's privacy not to be significant because the students produced their samples behind closed stalls, the samples were not turned over to law enforcement, and discipline resulted only after repeated positive test results. Id. at 2566-67. Lastly, the Court considered the nature and immediacy of the government's concerns and the efficacy of the policy in meeting them. The Court recognized that a demonstrated drug abuse problem was not required for the policy to be justified and found, in any event, that the school district presented sufficient evidence to shore up the need for drug testing. Id. at 2567-68. The Court rejected the Tenth Circuit's requirement that, for the testing to be reasonable, the school district demonstrate some identifiable drug abuse problem among the students to be tested. Additionally, the Court refused to impose a requirement of individualized suspicion as a prerequisite to drug testing based on the following reasoning:

> reasonableness under the Fourth Amendment does not require employing the least intrusive means, because "the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers."

Earls, 122 S. Ct. at 2569 (quoting Martinez-Fuerte, 428 U.S. at 556-57, n.12).

In Griffin v. Wisconsin, 483 U.S. 868 (1987), the Court analyzed whether the state's need to operate its probation system justified a probation department regulation that allowed a warrantless search of petitioner's home, who was on probation, based on reasonable grounds rather than probable cause. Griffin, 483 U.S. at 872. First, the Court found that the operation of a probation system to supervise probationers presented a special need beyond that of ordinary law enforcement which justified dispensing with the

usual probable cause and warrant requirements. Id. at 873-74. The Court reasoned that the probation system worked towards genuine rehabilitation with intensive supervision reducing recidivism. With this in mind, the Court found that a warrant and probable cause requirement would unduly interfere with the probation officer's ongoing supervisory relationship with the probationer. Id. at 876-79. Consequently, the Court held that the search of petitioner's home was reasonable because it was done pursuant to a valid regulation governing probationers. Id. at 880.

In this case, the initial question is whether the county has articulated a government interest that qualifies as a special need beyond ordinary law enforcement concerns. First, it is undisputed that the cash aid at issue is administered by the county pursuant to the CalWORKs program. Additionally, a significant part of this funding is provided to the states through federal block grants known as Temporary Assistance to Needy Families ("TANF"). 42 U.S.C. § 601 et seq.; Cal. Welf. & Inst. Code §§ 10101(c), 11200.5. Congress provided these funds in order to allow states to create programs designed to, "provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives." 42 U.S.C. § 601(a)(1). Moreover, both federal and state law require that the public agency administering the aid implement procedures to prevent fraud and abuse. 42 U.S.C. § 602 (a)(6); Cal. Welf. & Inst. Code § 11055.5. For this purpose, the county enacted Project 100% with the attendant home visits, as a means to verify eligibility of applicants for cash aid in order to prevent welfare fraud. While plaintiffs may argue that the purpose of fraud prevention makes the home visits ordinary criminal investigations, the evidentiary record before the court undermines this argument. The Project 100% home visits have not resulted in criminal prosecutions for welfare fraud and the record is devoid of any evidence to the contrary. In contrast, the county has submitted undisputed evidence that

an applicant's refusal to consent to a home visit merely results in the denial of welfare benefits and does not result in criminal investigation or prosecution. Moreover, as explained in Wyman v. James, 400 U.S. 309 (1971), the county holds the funds in public trust. "The State, working through its qualified welfare agency, has *appropriate and paramount interest and concern* in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." Wyman, 400 U.S. at 318-19 (emphasis added). Consequently, the court finds that the county has a "special need" in ensuring that scarce public resources, intended for the benefit of needy children, are not wrongly consumed by those ineligible for such aid.

Having concluded that a special need exists in this case, the court considers the nature of the privacy interest at stake, recognizing that "[t]he Fourth Amendment does not protect all subjective expectations of privacy, but only those society recognizes as 'legitimate.'" Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995). Legitimacy, in turn, depends on the context in which a right is asserted. As stated by the Supreme Court "the legitimacy of certain privacy expectations vis-a-vis the State may depend upon the individual's legal relationship with the State." Id.

Here, the government action affects the home, traditionally a sanctified area of personal privacy. However, as illustrated by the decision in Griffin v. Wisconsin, 483 U.S. 868 (1987), a person's relationship with the state can reduce a person's expectation of privacy even within the sanctity of the home. This principle does not mean that government may without limitation demand entry into the home whenever a person applies for government aid, but rather, rests on a common sense understanding that a person cannot expect the government to dispense monetary aid, meant for the benefit of the applicant's child, without

investigating a person's eligibility to receive such aid. Importantly, when eligibility for such aid depends upon, in part, a person's physical residence in the state and actual presence at the place designated as their residence, verification of eligibility may be reasonably required in the form of the home visit under review here in order to ensure funds are properly spent. Consequently, it is reasonable for those persons who desire welfare benefits in the form of direct cash aid to expect eligibility verification through the means of a reasonable home visit.

Next, the court considers the extent of the intrusion caused by the home visits. Important to this inquiry is a recognition of the purpose of the visits. The undisputed facts reveal that the county investigators who conduct the home visits do so as a general policy unconnected to any particularized suspicion of fraud or wrongdoing. Thus, the purpose of the home visit is not to ferret out evidence of criminal activity, but rather, to ensure government aid reaches those for whom it is intended.

When considering the nature of the intrusion implicated by the home visits, the Supreme Court's guidance in Wyman is helpful. As was the case in Wyman, applicants here are informed in advance that a home visit will take place, there is no forced entry, and a visit, in effect, may be terminated at any time by the applicant with a denial of aid the only consequence. As with Wyman, neither police nor uniformed authorities conduct the visit. Further, the visits are conducted during normal business hours and by investigators trained to be courteous and respectful of the applicant. Additionally, the inspection phase of the visit is completed in a reasonable amount of time. Finally, there is no evidence before the court that any of the applicants have been subjected to abusive or rude behavior during the home visits. Thus the court concludes that although a home visit does involve an intrusion upon privacy, that intrusion is reasonable under the

circumstances when viewed in the context of the government's legitimate interest in verifying eligibility for aid through the home visit.

In reaching this conclusion, the court rejects plaintiffs' efforts to distinguish Wyman. Plaintiffs argue, for example, that any rehabilitive purpose for the visit is questionable, the visits are done by sworn peace officers who carry badges identifying them as public assistance fraud investigators, that collateral contacts are made, and that visits include "snooping" [8] which was forbidden under the program addressed in Wyman. These arguments miss the point. While there may be some factual differences between this case and Wyman, it is the Wyman standard of reasonableness of the intrusion in light of the government's purpose that governs. Consequently, the court concludes that, based on the totality of circumstances, the intrusion into applicants' privacy caused by the home visit and "walk through" is reasonable.

Finally, the court analyzes the need for the intrusion in light of its efficacy in meeting the government interests at stake. On this point, plaintiffs vigorously argue that defendants have not shown any statistically significant evidence that the home visits at issue actually reduce welfare fraud. Plaintiffs assert that the home visits merely duplicate the intake interviews and do not provide any useful data that could not be gathered by other means. However, as the Supreme Court has stressed, the Fourth Amendment does not require that the government use the least intrusive means "because the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the

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[8] Plaintiffs point out that no specific protocol limits where the investigator may look and investigators in the past have requested permission to view items in drawers, medicine, cabinets, laundry hampers and the trash.

exercise of virtually all search-and-seizure powers." Earls, 122 S. Ct. at 2569. More importantly, the Supreme Court has already rejected the argument made by plaintiffs since it found in Wyman that secondary sources of information cannot "always assure verification of actual residence or actual physical presence in the home," which are requirements for eligibility for aid. Wyman, 400 U.S. at 322. Here, the county through the home visit seeks information in order to confirm that a reported absent parent is truly absent, the presence of dependent children, the applicant's actual residence in California and actual physical presence in the home, and the applicant's claimed amount of assets. While advances in information technology since Wyman have occurred, this technology has its limitations and cannot serve as a substitute for the observations to be made during a home visit. Plaintiffs argue that less intrusive effective means can be used to gather the information sought by defendants by limiting home visits to cases where fraud is suspected. However, reasonableness, and not reasonable suspicion, is the touchstone of the Fourth Amendment in "special needs" jurisprudence. See Earls, 122 S. Ct. at 2568-69. Thus the court affirms its finding that the intrusion into the home caused by a home visit, designed to further the legitimate government interest in preventing welfare fraud, is reasonable under the circumstances.

In sum, the court finds that the home visit program conducted under Project 100%, as stated in Wyman v. James, 400 U.S. 309 (1971), "is a reasonable administrative tool; that it serves a valid and proper administrative purpose . . . [and] that it is not an unwarranted invasion of personal privacy." Wyman, 400 U.S. at 326. Therefore, the county's home visit program does not violate any right guaranteed by the Fourth Amendment.[9]

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[9] The recent Ninth Circuit case of United States v. Crawford, __ F.3d__, No. 01-50633 (9th Cir. 2003), does not alter the court's finding.

Due Process Violation

Plaintiffs allege that the denial of welfare aid based on the applicant's refusal to allow a home visit violates the applicant's right to due process under the Fourteenth Amendment and the Federal Civil Rights Act (42 U.S.C. 1983), but fail to rebut defendants' arguments that summary judgment should be granted on this claim. Plaintiffs' failure to present facts supporting the claim of due process violation is sufficient to grant summary judgment in defendants' favor because a party may not rest on the allegations in their pleadings where they bear the burden of proof at trial. Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). Defendants have also shown that no due process claim exists on the facts of this case. As such, summary judgment in favor of defendants on plaintiffs' due process claim is warranted.

Violation of Federal Food Stamp Regulations

Plaintiffs allege that the home visits violate federal food stamp regulations because the county imposes impermissible eligibility criteria on joint applicants for federal food stamps and cash aid under CALWORKs by denying food stamps to joint applicants who refuse to consent to a home visit. However, the threshold issue is whether or not a private cause of action exists that would allow plaintiffs to sue solely for violation of the food stamp regulations.

Crawford deals with a suspicionless search of a parolee's home for law enforcement purposes and notes that such a search is not justified by the "special needs" jurisprudence of the Supreme Court. Crawford does not support plaintiffs' position in this case, however, given that the Project 100% home visit is not conducted for the purpose of law enforcement. Moreover, Crawford does not in anyway diminish the import of the Wyman analysis which, as addressed above, is predicated upon the reasonableness of the activity in question.

Plaintiffs' allege violations of the federal regulations in their fifth, sixth, and ninth causes of action but make no mention of any federal statutory violations. Defendants argue that failure to allege a violation of the Food Stamp Act, 7 U.S.C. § 2011 et seq., is fatal to plaintiffs' claim because no private cause of action can be asserted directly under federal regulations and rely on Alexander v. Sandoval, 532 U.S. 275 (2001) (holding no private cause of action for violations of federal regulations promulgated under Title VI § 602 because Congress did not create a private right of action under § 602). However, the Court in Alexander addressed whether a private action could be maintained under the federal regulations when the statute under which the regulations were promulgated did not create a private right of action. Alexander v. Sandoval, 532 U.S. 275, 291 (2001). In contrast, the Ninth Circuit has permitted a private right of action under the Food Stamp Act and regulations promulgated to enforce the Act. Withrow v. Concannon, 942 F.2d 1385, 1386 (9th Cir. 1991) (holding that district court erred by rejecting plaintiffs' prayer for an injunction requiring more than substantial compliance to federal regulations promulgated under the Food Stamp Act, but noted that the issue of a private right of action under the Act was not argued). Furthermore, the Seventh Circuit's analysis of congressional intent to allow a private right of action for violation of the Food Stamp Act is persuasive. Haskins v. Stanton, 794 F.2d 1273, 1274-75 (7th Cir. 1986) (finding that the legislative history of the Act illustrated that Congress intended to allow a private right of action for enforcing the Food Stamp Act). Therefore, the court concludes a private right of action exists to enforce the regulations promulgated under the Food Stamp Act because "[a] Congress that intends the statute to be enforced through a private cause of

action intends the authoritative interpretation of the statute to be so enforced as well." Alexander, 532 U.S. at 284.[10]

Turning to the merits of plaintiffs' claims, plaintiffs allege in their fifth cause of action that the county impermissibly requires home visits for joint applicants seeking cash aid and federal food stamps. Under 7 C.F.R. § 273.2(f)(4)(iii), home visits, in order to determine food stamp eligibility, may only be used where documentary evidence is insufficient to verify eligibility.[11] However, under section 273.2(j)(1)(iii), a state agency can apply its own verification rules where there is overlap between eligibility criteria for state public assistance and food stamp benefits.[12] S.L. v. Whitburn, 67 F.3d 1299, 1306 (7th Cir.

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[10] Additionally, even though plaintiffs fail to specifically allege the statute violated by conduct that violates the federal regulations, federal law only requires notice pleading such that only the facts underlying the violation need be alleged. McCalden v. California Library Ass'n, 955 F.2d 1214, 1223 (9th Cir. 1992) (only the facts that form the basis of a statutory violation need be pled to overcome dismissal for failure to state a claim); Haddock v. Board of Dental Examiners, 777 F.2d 462, 464 (9th Cir. 1985) (complaint alleging facts showing a § 1983 claim not subject to dismissal for failure to state a claim even though § 1983 not alleged in complaint).

[11] 7 C.F.R. § 273.2(f)(4)(iii) provides in part:

> Home visits may be used as verification only when documentary evidence is insufficient to make a firm determination of eligibility of eligibility or benefit level, or cannot be obtained, and the home visit is scheduled in advance with the household.

7 C.F.R. § 273.2(f)(4)(iii).

[12] 7 C.F.R. § 273.2(j)(1)(iii) states:

> For households applying for both PA and food stamps, the State agency must follow the verification procedures described in paragraphs (f)(1) through (f)(8) of this section for those factors of eligibility which are needed solely for purposes of determining the

1995) (holding food stamp regulations govern verification procedures for joint applications for food stamps and public assistance only when verification eligibility criteria unique to the Food Stamp program). In rebuttal, plaintiffs point out that 7 C.F.R. § 273.2(j)(1)(iii), while allowing the use of state verification procedures for joint applicants, prohibits the denial of federal food stamps based on a failure to satisfy eligibility for state aid. Plaintiffs cite to the declaration of eligibility technician Zamora who testified that in practice an applicant's refusal to allow a home visit under Project 100% will make the applicant ineligible for food stamps. [13] However, defendants rely on Zamora's subsequent declaration stating that his deposition testimony was mistaken, and the testimony of Linda Joerden, who has responsibility for establishing county policy on this issue, where she testified that food stamp eligibility is unaffected by a denial of cash aid. Thus, given the conflicting evidence on this material point, summary judgment is not appropriate

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> household's eligibility for food stamps. For those factors of eligibility which are needed to determine both PA eligibility and food stamp eligibility, the State agency may use the PA verification rules. However, if the household has provided the State agency sufficient verification to meet the verification requirements of paragraphs (f)(1) through (f)(8) of this section, but has failed to provide sufficient verification to meet the PA verification rules, the State agency may not use such failure as a basis for denying the household's food stamp application or failing to comply with processing requirements of paragraph (g) of this section. Under these circumstances, the State agency must process the household's food stamp application and determine eligibility based on its compliance with the requirements of paragraphs (f)(1) through (f)(8) of this section.

7 C.F.R. § 273.2(j)(1)(iii).

[13] Cacciavillani Decl., Ex. 17, pp. 45-46.

on this claim.[14]

Turning to plaintiffs' ninth cause of action, plaintiffs allege that the county violated the confidentiality and collateral contact requirements of 7 C.F.R. § 273.2 (f)(4) and (f)(5)(ii), respectively. [15] As to the confidentiality requirement, section 273.2(f)(4)(ii) requires that any disclosure of information in making collateral contacts be done only where absolutely necessary and should avoid

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[14] Defendants rely on an unpublished district court opinion for its argument that the county may use county criteria for determining food stamp eligibility where there is a joint application for cash aid. See Roberson v. Giuliani, 2000 U.S. Dist. LEXIS 7965 (S.D.N.Y. 2000). However, the court is not persuaded by the reasoning in Roberson given the express language in the federal regulations that "if the household has provided the State agency sufficient verification to meet the verification requirements of paragraphs (f)(1) through (f)(8) of this section, but has failed to provide sufficient verification to meet the [state's public assistance] verification rules, the State agency may not use such failure as a basis for denying the household's food stamp application." 7 C.F.R. § 273.2(j)(1)(iii). Therefore, denial of the food stamp application based on failure to allow a walk through (which is not a basis allowed under § 273.2 that exclusively governs the criteria for determining food stamp eligibility) violates this regulation. However, as mentioned above, a factual dispute exists as to whether such a denial takes place. Additionally, while plaintiffs allege a violation of food stamp regulations in count six of the first amended complaint, this count is duplicative of the claim alleged in count five and therefore need not be addressed by the court.

[15] 15 7 C.F.R. § 273.2(f)(4)(ii) states in relevant part: "When talking with collateral contacts, State agencies should disclose only the information that is absolutely necessary to get the information being sought. State agencies should avoid disclosing that the household has applied for food stamps, nor should they disclose any information supplied by the household." 7 C.F.R § 273.2(f)(4)(ii). In addition, 7 C.F.R. § 273.2(f)(5)(ii) provides in relevant part: "Whenever documentary evidence is insufficient to make a firm determination of eligibility or benefit level, or cannot be obtained, the State agency may require a collateral contact or a home visit in accordance with paragraph (f)(4) of this section." 7 C.F.R. § 273.2(f)(5)(ii).

disclosing that a person has applied for food stamps. Here, plaintiffs allege that while county investigators do not disclose that a person is applying for public assistance, they tell collateral contacts that they are public assistance investigators and question the contacts about the applicant.[16] However, plaintiffs admit that the investigators do not disclose that a person has applied for food stamps and further acknowledge that disclosure of the investigator's position can be seen as necessary in obtaining the cooperation of the collateral contacts. Additionally, plaintiffs' argument that collateral contacts are made in situations forbidden by § 273.2(f)(5)(ii) fails for the reason discussed above, namely that the state is allowed to apply its verification procedures when criteria for state aid and food stamp benefits overlap. 7 C.F.R. § 273.2(j)(1)(iii); S.L. v. Whitburn, 67 F.3d 1299, 1306 (7th Cir. 1995). Therefore, summary judgment in favor of defendants is appropriate on the alleged violations of federal food stamp violations in the ninth cause of action.

C. State Law Claims

California Constitutional Right to be Free from Unreasonable Searches

Plaintiffs argue that the home visit program violates their right to be free from unreasonable searches as stated in Article I § 13 of the California Constitution and rely on the California Supreme Court decision in Parrish v. Civil Service Commission, 66 Cal. 2d 260 (1967).

In Parrish v. Civil Service Commission, 66 Cal.2d 260 (1967), Alameda County implemented suspicionless mass welfare raids by having pairs of social workers conduct searches of welfare recipients on Sunday mornings beginning at 6:30 a.m. The purpose of the raid on recipients

[16] Plaintiffs' Separate Statement of Undisputed Facts, p. 11, ¶ 105.

not suspected of fraud was to "persuade the public that the incidence of welfare fraud falls below popular estimates." Id. at 274. The raid was conducted by having welfare recipients' social workers knock on the recipient's door and request consent to enter. Refusal to consent could serve as a basis for terminating welfare benefits. If consent was given, then the recipient's case worker would immediately proceed to the back door to admit his or her partner with the pair then searching the residence for evidence of welfare fraud. Id. at 264. The court rejected the argument that the raids were administrative searches that could be done without probable cause and a warrant under the Supreme Court's decision in Franks v. Maryland, 359 U.S. 360 (1959), because the searches were done at great inconvenience to the occupant, without suspicion of fraud, and were far removed from orderly daytime administrative searches. Id. at 266-67. The court also reasoned that the raids could not be justified by consent since "[t]he request for entry by persons whom the beneficiaries knew to possess virtually unlimited power over their livelihood . . . nulli[fied] the legal effectiveness of the apparent consent." Parrish, 66 Cal.2d at 270.

The facts underlying the decision in Parrish certainly distinguish this case from Parrish, even assuming that the reasonableness of the search is governed by California law.[17] Here, the searches are orderly daytime visits not done with the goal of demonstrating to the public the efficiency of welfare fraud detection, but done in order to gather

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[17] The Parrish court's discussion of the reasonableness of the search and the voluntariness of consent raises serious doubts that the court relied on the California Constitution in finding that the searches were unreasonable. This is illustrated by the court's express statements addressing the issue in the case as one under the Fourth Amendment without reference to the California Constitution and the court's analysis of the reasonableness of the search under United States Supreme Court precedent.

information bearing on an applicant's eligibility for welfare benefits. Moreover, the court in Parrish relied on the decision in Franks v. Maryland, without the benefit of the decision in Wyman v. James, 400 U.S. 309 (1971). As such, the court concludes that the home visits at issue here are constitutional under California law since Article I § 13 of the California Constitution is analogous to the Fourth Amendment in that it only prohibits unreasonable searches. Hill v. National Collegiate Athletic Assn., 7 Cal. 4th 1, 29 (1994) (right to be free from unreasonable searches under Art. I § 13 of the California Constitution parallels the Fourth Amendment inquiry into the reasonableness of a search by conducting a general balancing test); In re York, 9 Cal. 4th 1133, 1149 (1995) ("The United States and California Constitutions proscribe only *unreasonable* searches and seizures."). Therefore, summary judgment in favor of defendants is proper on the plaintiffs' claim under Article I § 13 of the California Constitution.[18]

Unconstitutional Conditions

The California Supreme Court has established that where receipt of a public benefit requires the waiver of a constitutional right, the agency that sets the conditions for the receipt of the benefit must establish

> (1) that the conditions reasonably relate to the purposes sought by the legislation which confers the benefit; (2) that the value accruing to the public from imposition of those

[18] The court also grants summary judgment in favor of defendants on the right to privacy claim under Article 1 § 1 of the California Constitution since, in the search and seizure context, this provision of the California Constitution "has never been held to establish a broader protection than that provided by the Fourth Amendment of the United States Constitution or article I, section 13 of the California Constitution." In re York, 9 Cal. 4th 1133, 1149 (1995).

> conditions manifestly outweighs any resulting impairment of constitutional rights; and (3) that there are available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.

Parrish v. Civil Service Commission, 66 Cal. 2d 260, 271 (1967) (citations omitted). In Parrish, the California Supreme Court held that suspicionless mass home visits of welfare recipients' homes performed by county social workers were unreasonable searches under the Fourth Amendment because they did not qualify as administrative searches under Franks v. Maryland, 359 U.S. 360 (1959) and thus required probable cause and a warrant to be lawful. The court seasoned that even if the welfare recipients had voluntarily and effectively waived their right to be free from the unreasonable searches, the county's conditioning the receipt of public aid on consent to entry into the home triggered the California Constitution's unconstitutional conditions doctrine. Id. Although the court noted that under some circumstances the early Sunday morning welfare raids might reasonably relate to the prevention of welfare fraud, Id. at 272, the court stated that the record before it was insufficient to show the value accruing from such raids outweighed the impairment of constitutional rights. In any event, the court explained:

> so striking is the disparity between the operation's declared purpose and the means employed, so broad its gratuitous reach, and so convincing the evidence that improper considerations dictated its ultimate scope, that no valid link remains between that operation and its proffered justification [the prevention of welfare fraud].

Id.

In this case, home visits under the Project 100% do not violate California's unconstitutional conditions doctrine. The threshold requirement for the unconstitutional conditions doctrine to apply is conditioning of a benefit on the waiver of a constitutional right. Parrish, 66 Cal. 2d at 271. In Parrish, the welfare recipients were required to waive their constitutional right to be free from what otherwise was an unreasonable search in order to receive welfare benefits. Here, the court has already found that *even absent voluntary consent* the home visits under Project 100% are reasonable, supra. Thus, the receipt of benefits in this case is not being conditioned upon the waiver of a constitutional right under either the California or federal constitution because the Fourth Amendment and Article I § 13 only create a right to be free from unreasonable government intrusions into the home. See Bd. of Educ. v. Earls, 536 U.S. 822; 122 S. Ct. 2559, 2564 (2002); In re York, 9 Cal. 4th 1133, 1149 (1995). Therefore, the home visits do not impose an unconstitutional condition since they do not condition the receipt of public benefits on what, without such consent, would be an unreasonable search.[19]

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[19] Additionally, the home visit program passes muster even if the court applies the three-prong test set out in Parish v. Civil Service Commission, 66 Cal. 2d 260 (1967). First, the home visits are used to gather information affecting an applicant's eligibility and thus serves the purposes sought by the legislation which is ensuring that applicant's are in fact eligible for aid. Second, the court finds that the benefit of the home visits "manifestly outweighs" any impairment of a constitutional right since, as discussed supra, there is no impairment of plaintiffs' constitutional rights and the home visits allow the county to confirm information that cannot be confirmed by secondary sources. Third, secondary sources simply cannot assure, as noted in Wyman v. James, 400 U.S. 309 (1971), that certain eligibility requirements, such as actual residence, are met. Therefore, the home visits do not impose an unconstitutional condition of the receipt of welfare benefits.

California Welfare Eligibility Criteria

The first amended complaint alleges in the fifth through ninth causes of action that the home visits violate various state statutes and regulations governing the use of eligibility criteria for cash aid under the CalWORKs program. As recently explained by the California Court of Appeal, under California Welfare and Institutions Code § 11050, "the state is responsible 'for maintaining uniformity in the public social service programs.'" Smith v. Los Angeles County Bd. of Supervisors, 104 Cal. App. 4th 1104, 1109 (2002) (quoting Cal. Welf. & Inst. Code § 11050). To this end, the California Department of Social Services ("DSS") oversees the administering of the CalWORKs program by the counties. Id. (citing Cal. Welf. & Inst. Code §§ 10550, 10600). Consequently, the counties must follow the regulations promulgated by DSS which appear in its Manual of Policies and Procedures ("MPP") and may not create new eligibility conditions for the receipt of welfare benefits. Id. at 1110 (citing Cal. Welf. & Inst. Code § 11209); Ramos v. County of Madera, 4 Cal. 3d 685, 695 (1971) (holding that counties have purely ministerial authority in ensuring applicants for welfare benefits are eligible for such benefits since eligibility criteria are set by statute and DSS regulations at the state level).[20]

Turning to plaintiffs' fifth cause of action, plaintiffs allege that the home visits impose new eligibility criteria in violation of, inter alia,[21] MPP §§ 40-161 and 63-300.543.[22]

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[20] Defendants argue that no private right of action exists to enforce the regulations set forth in the MPP. However, this argument lacks merit in light of the decision in Smith v. Los Angeles County Bd. of Supervisors, 104 Cal . App. 4th 1104 (2002), where the court decided on the merits plaintiffs' claims that the Los Angeles County's pilot home visit program violated many of the regulations at issue here.

[21] Plaintiffs also allege violations of California Welfare and Institutions Code §§ 10600, 11207, 11209, and 11250 but the gravamen

Plaintiffs argue that both these sections limit the county's ability to use home visits for verifying eligibility for aid to the circumstances provided in each section. However, plaintiffs' claims under MPP § 40-161 and § 63-300.543 fail for the reasons set out in Smith v. Los Angeles County Bd. of Supervisors, 104 Cal. App. 4th 1104 (2002).[23]

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of the claim as briefed by the parties are the alleged violations of the relevant MPP sections.

[22] MPP § 40-161 states in relevant part:

> A home visit prior to approval of aid and prior to completion of periodic redetermination of eligibility pursuant to 40-181.1 is required when living arrangements or other factors affecting eligibility, or apparent eligibility in cases of immediate need or diversion, cannot be satisfactorily determined without such a visit.

Department of Social Services Manual of Policies and Procedures § 40-161.

Additionally, MPP § 63-300.543, which falls under the heading of application process and provides in part:

> Home visits may be used as verification when documentary evidence is insufficient to make a determination of eligibility or benefit level or cannot be obtained and the visit is scheduled in advance with the household.

Department of Social Services Manual of Policies and Procedures § 63-300.543.

[23] Plaintiffs also argue that defendants violated MPP §§ 40-131.11 and 40-131.12 which they argue prohibits the county from performing more than one interview to determine a joint applicant's eligibility for both state aid and federal food stamps. However, this claim is not properly before the court since plaintiffs did not allege this claim in their first amended complaint and have not shown good cause for amendment of the complaint. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294-95 (9th Cir. 2000) (holding no abuse of discretion where district court denied motion to amend pleadings at summary judgment in order to add an omitted claim since plaintiffs failed to show good cause under Federal

In Smith v. Los Angeles County Bd. of Supervisors, 104 Cal. App. 4th 1104 (2002), the plaintiffs claimed that the county's home visit program violated, inter alia, MPP § 40-161 in that home visits were done as general practice and were not limited to situations where eligibility cannot otherwise be determined satisfactorily. Smith v. Los Angeles County Bd. of Supervisors, 104 Cal. App. 4th 1104, 1117 (2002). In addressing this argument, the court relied heavily on the interpretation given the DSS regulations by DSS deputy director Wagstaff who interpreted whether MPP § 40-161 limited a county's ability to conduct suspicionless home visits. Wagstaff stated, "[t]here is nothing in the Department's regulations *that prohibits a county from imposing reasonable home visit requirements on all applicants for CalWORKs benefits as a condition of eligibility*." Id. at 1118. The court reasoned that the agency's interpretation of its regulations was entitled to deference and held that the home visit did not violate MPP § 40-161.

Here, the reasoning in Smith is persuasive as to the claimed violations of MPP §§ 40-161 and 63-300.543. Neither section contains language prohibiting the county from requiring home visits in order to verify eligibility for aid under CalWORKs. Additionally, while DSS deputy director Wagstaff addressed whether the Los Angeles home visit program violated DSS regulations, his interpretation of those regulations is persuasive in this case given Wagstaff's clear statement that nothing in DSS regulations limited the county's ability to conduct a home visit as a requirement for eligibility under CalWORKs. Therefore, defendants are entitled to summary judgment on these state law claims.[24]

Rule of Civil Procedure 16(b) for not seeking amendment within the time set by the scheduling order).

[24] The court reaches this conclusion without relying on the declaration of Robert Campbell whose testimony plaintiffs seek to strike. As such, the motion to strike is moot.

Regarding the sixth cause of action, plaintiffs allege that the home visits require welfare applicants to produce more evidence than necessary for satisfying eligibility in violation of California Welfare and Institutions Code § 10500 and MPP §§ 40-101.12 and 40-126.31.[25] Under California Welfare and Institutions Code § 10500, any person administering benefits under CalWORKS

> shall endeavor at all times to perform his duties in such manner as to secure for every person the amount of aid to which he is entitled, without attempting to elicit any information not necessary to carry out the provisions of law applicable to the program.

Cal. Welf. & Inst. Code § 10500. Plaintiffs argue that county investigators elicit unnecessary information by conducting "walk throughs" of applicants' homes. However, the court is convinced otherwise since § 10500 only prohibits the county from attempting to elicit unnecessary information. The home visit requirement is not an attempt to elicit unnecessary information, but is the county's effort to gather evidence concerning the amount of assets claimed by an

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[25] MPP § 40-101.12, which falls under the heading of general policies and principles, states:

> It is the responsibility on all who are concerned with the administration of aid to do so with courtesy, consideration, and respect toward applicants and recipients and without attempting to elicit any unnecessary information.

Department of Social Services Manual of Policies and Procedures § 40-101.12.

MPP § 40-126.31 similarly provides that "[t]he county shall require only evidence necessary to determine past or present eligibility for the amount of delivery of aid." Department of Social Services Manual of Policies and Procedures § 40-126.31.

applicant, the existence of an eligible child, residence in California, and the presence of an absent parent all of which directly relate to an applicant's eligibility. That a home visit may elicit information which ultimately turns out to be unnecessary to the determination of eligibility does not affect the purpose of the home visit. Therefore, the home visits do not violate § 10500 and the relevant regulations.

Addressing the seventh cause of action, plaintiffs allege that California Welfare and Institutions Code § 11055.5(d)(6) and (d)(7) limit the county's ability to conduct welfare fraud investigations to those instances where a suspicion of fraud exists. Section 11055.5(d)(6) provides "[t]he county shall make a referral for welfare fraud investigation when there is reason to believe that a person, on behalf of himself or herself or others, has done," any of the listed actions under subsection (d)(6). Subsection (d)(7) similarly requires a referral for fraud investigation when there are reasonable grounds to make such a referral.[26] This argument fails because the language expressed in the statute simply states when welfare fraud referrals "shall be" made and does not address the county's ability to conduct home visits when there is no suspicion of fraud. See Smith, 104 Cal. App. 4th at 1120 (holding that home visits by eligibility workers which are used as a means of fraud prevention did not violate California Welfare and Institutions Code § 11055.5(d)(6), (d)(7)). Therefore, the court declines to insert language of limitation not included by the California

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[26] California Welfare and Institutions Code § 11055.5(d)(7) states in relevant part

> The county shall make a referral for fraud investigation when there are reasonable grounds to believe that fraud, as specified in paragraph (6), exists. Reasonable grounds exist when one or more of the following criteria exists . . .

Cal. Welf. & Inst. Code § 11055.5(d)(7).

Legislature and concludes that defendants are entitled to summary judgment on this claim.

Under the eighth cause of action, plaintiffs essentially allege that the home visits at issue constitute mass and indiscriminate home visits which are prohibited by MPP § 20-007.33. The plain text of MPP § 20-007.33 states "Mass or indiscriminate home visits are prohibited." Department of Social Services Manual of Policies and Procedures, § 20-007.33.[27] Plaintiffs argue that the home visits are both mass and indiscriminate because they are done on all applicants for CalWORKs aid and do not discriminate between applicants based on any reasonable suspicion of fraud. However, the court rejects these arguments based on a reading of § 20-007 as a whole and the context in which the prohibition on mass and indiscriminate visits is made. See Beno v. Shalala, 30 F.3d 1057, 1068 (9th Cir. 1994) (explaining that "a statute is to be read as a whole. The meaning of statutory language, plain or not, depends on context.") (citations omitted). Section 20-007 addresses the establishment of a special investigative unit ("SIU") for "investigating suspected welfare fraud and suspected violations of law." Department of Social Services Manual of Policies and Procedures § 20-007.1 (addressing the purposes for which special investigative units are established). Section 20-007.31 also specifically states that the responsibility of the SIU is to "[i]nvestigate any activity . . . which may constitute welfare fraud." Department of Social Services Manual of Policies and Procedures § 20-007.31. This language illustrates that § 20-007 simply does not address the situation currently before the court for reasons already enumerated. Consequently, the court concludes that DSS did not intend to include the prohibition on mass and

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[27] Plaintiffs also allege in the eighth count a violation of MPP § 40-161, yet this section does not address mass or indiscriminate home visits.

indiscriminate home visits to the home visits at hand. This conclusion is also buttressed by the holding in Smith, 104 Cal. App. 4th at 1118-19, where the court rejected the argument that home visits required of all welfare applicants violated the prohibition on mass and indiscriminate home visits. Therefore, defendants are entitled to summary judgment on this claim.

Lastly, the court addresses plaintiffs' state law claims raised in the ninth cause of action. Plaintiffs allege that the home visits violate California Welfare and Institutions Code § 10850 because investigators disclose to third parties, such as apartment managers and neighbors, that applicants are applying for welfare benefits. Plaintiffs also allege that the collateral contacts by the investigators require an applicant's consent under MPP § 40-157.22 and § 19-007. Each issue will be discussed in turn.

The initial question is whether plaintiffs' identities as welfare applicants constitutes confidential information under § 18050 which requires an examination of the language of the statute as well as California case law. Section 10850(a) provides in relevant part

> Except as otherwise provided in this section, all applications and records concerning any individual made or kept by any public officer or agency in connection with the administration of any provision of this code relating to any form of public social services for which grants-in-aid are received by this state from the United States government *shall be confidential*, and shall not be open to examination for any purpose not directly connected with the administration of that program . . .

Cal. Welf. & Inst. Code § 10850(a) (emphasis added). Additionally, § 10850 (b) states

> Except as otherwise provided in this section, no person shall publish or disclose or permit or cause to be published or disclosed any list of persons receiving public social services. Any county welfare department in this state may release lists of applicants for, or recipients of, public social services, to any other county welfare department or the State Department of Social Services, and these lists or any other records shall be released when requested by any county welfare department or the State Department of Social Services. These lists or other records shall only be used for purposes directly connected with the administration of public social services. Except for those purposes, no person shall publish, disclose, or use or permit or cause to be published, disclosed, or used any confidential information pertaining to an applicant or recipient.

Welf. & Inst. Code § 10850(b). California courts have interpreted this language to mean that confidential information includes "the agency's files and the information contained in them." Jonon v. Superior Ct., 93 Cal. App. 3d 683, 691 (1979) (holding that physical observations of a welfare recipient by a social worker did not constitute confidential information under § 10850). Consequently, because the identity of the welfare applicant is information contained within the county's files, a person's identity as a welfare applicant constitutes confidential information under § 10850. The questions that remain are whether the investigators have disclosed such information within the meaning of the statute and, if so, where the statute allows for

such disclosure.

Defendants argue there is no disclosure of confidential information to collateral contacts since it is undisputed that investigators refuse to tell third parties that the person about whom they are inquiring is applying for welfare benefits. Plaintiffs, on the other hand, point out that investigators identify themselves with cards or badges showing that they are public assistance fraud investigators and then ask questions about the applicant. This, plaintiffs argue, allows a collateral contact to reasonably infer that the person about whom inquiry is being made is a welfare applicant/recipient. The court concludes that such disclosure during a collateral contact is allowed under § 10850(b) since the statute except from the prohibition on disclosure "purposes directly connected with the administration of public social services." Cal. Welf. & Inst. Code § 10850(b). Here, the questioning of collateral contacts is directly connected to the administration of public social services. Therefore, plaintiffs are entitled to summary judgment on this claim.

Regarding the alleged violation of MPP § 40-157.22 and § 19-007,[28] plaintiffs allege that the county unlawfully

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[28] MPP § 40-157.22 provides:

> When needed in the evidence gathering process, and as evidence of the applicant's consent thereto, a specific consent form, signed by the applicant and, if necessary, by the spouse (by both parents in AFDC when this is possible) shall be obtained for each such contact.

Department of Social Services Manual of Policies and Procedures § 40-157.22.

Additionally, MPP § 19-007 states:

> Pursuant to EAS Sections 40-157.22 and 40-181.31 individual consent forms, signed by the applicant or recipient are required for each contact made during the evidence gathering process. An exception to this rule is

contacts third parties when gathering eligibility information since such parties are contacted without the applicant's consent. Defendants argue that the county is entitled to summary judgment on this claim because MPP § 20-007.36[29] creates an exception which allows SIUs to make third party contacts without the applicant's consent. Plaintiffs do not address this issue in their opposition or cross-motion. Despite the lack of opposition, defendants have failed to show that they are entitled to judgment as a matter of law on this count since the court is not convinced that the exception stated in MPP § 20-007.36 applies where, as here, the SIU investigators are not investigating welfare fraud as a crime but are merely acting as fact gathers for the determination of eligibility. Therefore, the court denies defendants' motion for summary judgment on the alleged violation of MPP §§ 40-157.22 and 19-007.

IV. CONCLUSION

For the above stated reasons, the court **grants** defendants' motion for summary judgment on all claims except for the alleged violation of 7 C.F.R. § 273.2(f)(4)(iii) as stated in count five of the first amended complaint and the alleged violations of MPP §§ 40-157.22 and 19-007.1 as stated in count nine. The court **denies** plaintiffs' motion for summary judgment on all counts. Additionally, the court

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found in MPP Section 20-007.36 which exempts SIUs from the requirement of permission to contact collateral sources.

Department of Social Services Manual of Policies and Procedures § 19-007.1.

[29] MPP § 20-007.36 provides that a special investigative unit ("SIU") shall "[n]ot be bound by the restrictions placed on eligibility determinations in Section 40-157.22 requiring recipient/applicant permission to contact collateral sources." Department of Social Services Manual of Policies and Procedures § 20-007.36.

denies plaintiffs' motions to strike as moot.

IT IS SO ORDERED.

DATED: 3/7, 2003

s/_____

JEFFREY T. MILLER

United States District Judge

cc: all parties

APPENDIX C

MILBERG WEISS BERSHAD HYNES & LERACH LLP
ERIC A. ISAACSON (120584)
BONNY E. SWEENEY (176174)
AMBER L. ECK (177882)
ALEXANDRA S. BERNAY (211068)
401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058

FILED
DEC 16 2003
CLERK, U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA
s/ [illegible]

ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
JORDAN C. BUDD (144288)
ELVIRA CACCIAVILLANI (183237)
P.O. Box 87131
San Diego, CA 92138-7131
Telephone: 619/232-2121

WESTERN CENTER ON LAW & POVERTY, INC.
ROBERT D. NEWMAN (86534)
RICHARD A. ROTHSCHILD (67356)
3701 Wilshire Blvd., Suite 208
Los Angeles, CA 90010-2809
Telephone: 213/487-7211

SAN DIEGO VOLUNTEER LAWYER PROGRAM
ROSEMARY H. BISHOP (112443)
625 Broadway, Suite 925
San Diego, CA 92101
Telephone: 619/235-5656

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROCIO SANCHEZ, et al., On Behalf of Themselves and All Others Similarly Situated,	)	No. 00-CV-1467-JM(JFS)
	)	CLASS ACTION
Plaintiffs,	)	
	)	~~[PROPOSED]~~
vs.	)	STIPULATED ORDER RE FINAL APPROVAL OF CLASS SETTLEMENT
COUNTY OF SAN DIEGO, et al.,	)	
	)	
Defendant(s).	)	
	)	

Based upon the Settlement Agreement between the plaintiffs and defendants and upon the evidence and argument presented at the fairness hearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. This Court has jurisdiction over the claims against defendants pursuant to 28 U.S.C. §§ 1331, 1343 and 1367. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

2. The Settlement Agreement is fair, reasonable and adequate for members of the class.

3. The Court shall retain jurisdiction to enforce the accompanying Settlement Agreement between the parties.

ENTERED ON 12-16-03

IT IS SO STIPULATED.

DATED: September 25, 2003

MILBERG WEISS BERSHAD
HYNES & LERACH LLP

ERIC A. ISAACSON
BONNY E. SWEENEY
AMBER L. ECK
ALEXANDRA S. BERNAY

s/_____
AMBER L. ECK

401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619/231-1058

ACLU FOUNDATION OF
SAN DIEGO & IMPERIAL
COUNTIES
JORDAN C. BUDD
ELVIRA CACCIAVILLANI
P.O. Box 87131
San Diego, CA 92138-7131
Telephone: 619/232-2121

WESTERN CENTER ON
LAW & POVERTY, INC.
ROBERT D. NEWMAN
RICHARD A. ROTHSCHILD
3701 Wilshire Blvd., Suite 208
Los Angeles, CA 90010-2809
Telephone: 213/487-7211

SAN DIEGO VOLUNTEER
LAWYER PROGRAM
ROSEMARY H. BISHOP
625 Broadway, Suite 925
San Diego, CA 92101
Telephone: 619/235-5656

Attorneys for Plaintiffs

DATED: September 24, 2003

JOHN J. SANSONE, COUNTY
COUNSEL

s/_____
THOMAS D. BUNTON,
SENIOR DEPUTY

1600 Pacific Highway,
Room 355
San Diego, California 92101
Telephone:
619/531-6218
619/531-6005 (fax)

Attorneys for Defendants

* * *

ORDER

IT IS SO ORDERED.

DATED: ~~September~~ __, 2003
Dec. 12, 2003

s/_____
THE HONORABLE
JEFFREY T. MILLER
UNITED STATES
DISTRICT JUDGE

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on September 25, 2003, declarant served the [PROPOSED] STIPULATED ORDER RE FINAL APPROVAL OF CLASS SETTLEMENT by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 25th day of September, 2003, at San Diego, California.

s/_____
BONNIE M. NAIDITCH

WELFARE SEARCH
Service List - 9/25/2003
(201-232)
Page 1 of 1

Counsel For Defendant(s)

Thomas D. Bunton
David G. Axtmann
Office Of County Counsel
1600 Pacific Highway,
Room 355
San Diego, CA 92101
619/531 -5649
619/531-6005(Fax)

Counsel For Plaintiff(s)

Jordan C. Budd
Elvira Cacciavillani
ACLU Foundation Of San Diego And Imperial Counties
P.O. Box 87131
San Diego, CA 92138-7131
619/232-2121
619/232-0036(Fax)

Rosemary H. Bishop
San Diego Volunteer Lawyer Program
625 Broadway, Suite 925
San Diego, CA 92101
619/235-5656
619/235-5668(Fax)

Eric A. Isaacson
Bonny E. Sweeney
Amber L. Eck
Milberg Weiss Bershad Hynes & Lerach LLP
401 B Street, Suite 1700
San Diego, CA 92101-4297
619/231-1058
619/231-7423(Fax)

Robert D. Newman
Richard A. Rothschild
Western Center On Law & Povery, Inc.
3701 Wilshire Blvd., Suite 208
Los Angeles, CA 90010-2809
213/487-7211
213/487-0242(Fax)

APPENDIX D

FILED
03 MAY 12 PM 12:54
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF
CALIFORNIA

BY: s/ [illegible] DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROCIO SANCHEZ, et al., Plaintiffs, vs. COUNTY OF SAN DIEGO, et al., Defendants.	CASE NO. 00 CV 1467 JM (JFS) ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION; GRANTING SUMMARY ADJUDICATION IN PLAINTIFFS' FAVOR

INTRODUCTION

On March 7, 2003, the court ruled on the parties' cross-motions for summary judgment and, with the exception of two claims, ruled in favor of defendants. The court ruled that the County of San Diego's Project 100%, which requires applicants for welfare benefits to submit to home visits in

order to be eligible for aid under CalWORKs, did not run afoul of the federal or California Constitution or violate the federal and state statutes and regulations governing the administration of welfare benefits. However, the court found a disputed issue of material fact precluded summary judgment on plaintiffs' claim under 7 C.F.R. § 273.2(f)(4)(iii). Additionally, the court found that defendants had failed to establish that they were entitled to judgment as a matter of law on portions of plaintiffs' ninth cause of action relating to the alleged violations of California Department of Social Services Manual of Policies and Procedures ("MPP") §§ 40-157.22 and 19-007.1. Sections 40-157.22 and 19-007.1 prohibit collateral contacts in gathering eligibility information about an applicant unless the contact is made by a special investigative unit ("SIU") or is made with the consent of the applicant.

Defendants now renews [sic] their motion for summary adjudication on the remaining portion of plaintiffs' ninth cause of action and plaintiffs move for reconsideration on the ninth cause of action.[1] Plaintiffs argue that they are entitled to summary judgment on the remaining MPP claims, while, in contrast, defendants argue the court erred by finding a private right of action exists to enforce DSS regulations. In the alternative, defendants request that the court stay a ruling on plaintiffs' motion for summary judgment pursuant to the Federal Rules of Civil Procedure Rule 56(f) until the California Department of Social Services ("DSS") interprets the relevant MPP sections. Pursuant to Local Rule 7.1(d)(1), the court finds these motions appropriate for decision without oral argument.

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[1] Ironically, it is defendants' motion which is in substance a motion for reconsideration since they argue the court erred by finding a private right of action while plaintiffs' motion appears to be more in the nature of a renewed motion for summary adjudication since they did not address the MPP regulations stated in their ninth cause of action in the cross-motions for summary judgment.

DISCUSSION

The court first addresses defendants' argument that the California Legislature did not intend to create a private right of action to enforce the CalWORKs statutes and DSS regulations promulgated thereunder. Defendants argue that no private right of action exists to enforce MPP §§ 40-157.22 and 19-007.1. Defendants argue that under Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58 (1988), and Arriaga v. Loma Linda University, 10 Cal. App. 4th 1556, 13 Cal. Rptr. 2d 619 (1992), the legislature must clearly and explicitly provide for a private right of action which it has not done in this case.

In Moradi-Shalal, the California Supreme Court concluded that the legislature had not intended to create a third-party private right of action to remedy insurance company violations of the Unfair Practices Act (Cal. Ins. Code § 790 et seq.). Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287, 304, 250 Cal. Rptr. 116, 758 P.2d 58 (1988). The court overruled its prior ruling in Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 153 Cal. Rptr. 842, 592 P.2d 329 (1979), where it had previously held that California Insurance Code § 790.03 gave an injured third party a private action against an insurer for "engaging in unfair settlement practices." Id. at 294. The court explained that the prior ruling errantly relied upon the language in California Insurance Code § 790.09 to imply a private right of action for damages since § 790.09 merely stated that cease and desist orders from the Insurance Commissioner did not relieve an insurance company from civil liability. The court reasoned that if the legislature intended to create a private right of action then more direct and precise language could have been used. Moradi-Shalal, 46 Cal. 3d at 294. The court went on to emphasize that most other states with similar statutes did not imply a private right of action, that the model act, upon which California's Unfair Practices Act was based,

declined to include a private right of action, that a comprehensive administrative scheme existed to enforce the Act, and that analytical difficulties and adverse social and economic consequences weighed against implying such an action *Id. at 294-303*. For all these reasons, the court held that Royal Globe erred in finding the legislature intended to create a private right to allow third parties to sue an insurer's insurance company for alleged violations of the Unfair Practices Act. *Id. at 304*.

Similarly, in Arriaga v. Loma Linda University, 10 Cal. App. 4th 1556, 13 Cal. Rptr. 2d 619 (1992), the court examined whether the legislature intended to create a private right of action for damages to enforce a provision of the California Fair Employment and Housing Act, specifically California Government Code § 11135. Arriaga v. Loma Linda University, 10 Cal. App. 4th 1556, 1561, 13 Cal. Rptr. 2d 619 (1992). Section 11135 provides that discrimination based upon, inter alia, sex is prohibited under a program receiving funding or assistance from the State. Cal. Gov. Code § 11135. The court reasoned that the legislative history and the comprehensive administrative scheme for enforcing violations of § 11135 evidenced an intent not to create a private right of action. The court pointed out that the legislative history of § 11135 specifically indicated that the legislature intended to shift the burden of enforcement of § 11135 from private individuals to state agencies. Id. at 1562-63. Moreover, the court explained that the legislative history emphasized the availability of other actions for damages in cases of discrimination and that § 11135 was meant as an alternative to private enforcement. The court also relied on the reasoning in Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58 (1988), by highlighting the existence of a comprehensive administrative scheme and a private party's ability to "bring a mandamus action to require an agency to comply with the regulations." Consequently, the court concluded that the legislature had

not demonstrated an intent to allow a private action for damages to enforce violations of § 11135.

Lastly, the Arriaga court analyzed whether a private action for damages should be implied to enforce § 11135 under the Restatement test adopted in California prior to the decision in Moradi-Shalal. To imply such an action, the court stated that the plaintiff must show that (1) she falls within the class of persons meant to be protected and (2) a private remedy in tort is needed to assure the effectiveness of the provision. Arriaga, 10 Cal. App. 4th at 1564. The court found the plaintiff had not shown a private action for damages was needed to enforce the statute given the existence of the comprehensive administrative enforcement scheme and, thus, held a private right of action could not be implied under § 11135. Id.

In contrast, plaintiffs argue that a number of California cases have allowed private actions, through mandamus proceedings, to enforce the state public-assistance statutes and implementing regulations. See, e.g., Woods v. Superior Court, 28 Cal. 3d 668, 170 Cal. Rptr. 484, 620 P.2d 1032 (1981) (AFDC recipient may challenge state regulations as violating state and federal AFDC statutes); Diaz v. Quitoriano, 268 Cal. App. 2d 807, 74 Cal. Rptr. 358 (1969) (class action may be brought by AFDC recipients to sue county for failing to give notices required by statute and implementing regulations); California Homeless & Housing Coalition v. Anderson, 31 Cal. App. 4th 450, 37 Cal. Rptr. 2d 639 (1995) (enforcing AFDC over DSS's objections that it created no private right of action); Fry v. Saenz, 98 Cal. App. 4th 256, 120 Cal. Rptr. 2d 30 (2002) (reversing denial of petition by parents of disabled children for writ of mandamus seeking declaration that a certain DSS rule was unlawful under CalWORKs). On this point, the court finds the decision in Woods v. Superior Court, 28 Cal. 3d 668, 170 Cal. Rptr. 484, 620 P.2d 1032 (1981), instructive.

In Woods, the court addressed whether the plaintiffs could, pursuant to a petition for writ of administrative mandamus under California Code of Civil Procedure ("CCP") § 1094.5, challenge the validity of the regulations upon which DSS had based its decision denying the plaintiffs' applications D for certain welfare benefits. Woods v. Superior Court, 28 Cal. 3d 668, 672, 170 Cal. Rptr. 484, 620 P.2d 1032 (1981). DSS argued the plaintiffs were required to file an action for declaratory relief, pursuant to Government Code § 11350,[2] or seek a writ of ordinary mandamus, pursuant to CCP § 1085, for the court to review the validity of the regulations underlying the decision denying benefits. However, the court found that the plaintiffs could challenge the regulations at the DSS hearing or through judicial review pursuant to CCP § 1094.5, § 1085, or in a declaratory relief action. The court explained that such review would not interfere with administrative rule making since the court's review would be limited to determining whether the regulations were valid under the statute. Id. at 679. Thus, the court held that administrative mandamus pursuant to § 1094.5 was a proper method for seeking review of a regulation's validity. The court also held

> interested persons who are not entitled to such "fair hearings" because they are neither applicants for, nor recipients of, public social service benefits, and who otherwise have standing to complain, still may challenge invalid regulations by mandamus pursuant to section 1085 or by action for declaratory relief

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[2] Government Code § 11350 states in relevant part:

> Any interested person may obtain a judicial declaration as to the validity of any regulation or order or repeal by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure.

> pursuant to section 1060. (Gov. Code, § 11350.)

Id. at 682.

In this case, the issue is whether the California Legislature has demonstrated an intent to allow a private action for the violation of the CalWORKs statutes and DSS regulations promulgated thereunder. Defendants argue that Moradi-Shalal stands for the proposition that the existence of a comprehensive administrative scheme demonstrates legislative intent to allow DSS, and not private persons, to enforce the statutes and regulations at issue. However, the holding in Woods, while not expressly dealing with the issue of the existence of a private right of action, explicitly held that "interested persons" may bring an action for declaratory relief to challenge the validity of CalWORKs regulations pursuant to California Government Code § 11350. The language of Government Code § 11350 demonstrates that the legislature intended to allow private parties to bring actions for declaratory relief regarding the validity of regulations and procedures implementing a state statute. In addition, the legislature has also provided private parties the right to seek judicial review of administrative decisions denying welfare benefits pursuant to California Welfare and Institutions Code § 10962.[3] Consequently, the legislature has demonstrated an intent to allow a private action to enforce the welfare statutes and regulations at issue.

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[3] While California Welfare and Institutions Code § 10962 only provides for judicial review after a hearing before DSS, plaintiffs would not be barred from challenging the Project 100% for failing to exhaust their administrative remedies. As explained in Diaz v. Quitoriano, 268 Cal. App. 2d 807, 74 Cal. Rptr. 358 (1969), class relief is not an available administrative remedy and is therefore not subject to exhaustion. Diaz v. Quitoriano, 268 Cal. App. 2d 807, 812, 74 Cal. Rptr. 358 (1969).

Defendants argue, however, that cases such as Woods are irrelevant because those cases were brought pursuant to writs of mandamus over which federal courts do not have jurisdiction. See Covington & Cincinnati Bridge Co. v. Hager, 203 U.S. 109, 111, 27 S. Ct. 24, 51 L. Ed. 111 (1906) (holding federal circuit courts have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ). However, this argument is off target since the question is whether the legislature has demonstrated an intent to allow private actions to enforce the statutes and regulations at issue. Therefore, for the reasons stated above, the court concludes that the California Legislature did intend to provide a private right of action for plaintiffs to enforce the statutes and regulations at issue in this case.

This conclusion is also supported by analogy to the decisions in Jacobellis v. State Farm Fire and Casualty Co., 120 F.3d 171 (9th Cir. 1997), and Diaz v. Quitoriano, 268 Cal. App. 2d 807, 74 Cal. Rptr. 358 (1969), even assuming the legislature has not directly demonstrated an intent to allow an action for declaratory relief to enforce the statutes and regulations before the court. In Jacobellis, the Ninth Circuit explained that "Moradi-Shalal did not hold that courts should never imply a private right of action." Jacobellis v. State Farm Fire and Casualty Co., 120 F.3d 171, 174 (9th Cir. 1997). The court analyzed the purpose of the statute at issue as stated in the legislative history and concluded that a private right of action should be implied to enforce a right created by the legislature. Id. at 173-74. The court recognized the existence of a private right of action under the test adopted in Middlesex Ins. Co. v. Mann, 124 Cal. App. 3d 558, 177 Cal. Rptr. 495 (1991), and further explained that a private right of action may be implied where "(1) the plaintiff belongs to the class of persons the statute is intended to protect; (2) a private remedy will appropriately further the purpose of the legislation; and (3) such a remedy

appears to be needed to assure the effectiveness of the statute." Id. at 174 (quoting Middlesex Ins. Co. v. Mann, 124 Cal. App. 3d 558, 570, 177 Cal. Rptr. 495 (1991)).

Regarding welfare benefits, the court in Diaz v. Quitoriano, 268 Cal. App. 2d 807, 74 Cal. Rptr. 358 (1969), addressed whether an administrative remedy existed for members of a class alleging the county failed to advise them of their right to an administrative hearing and judicial review as required by state statutes and DSS regulations. Diaz v. Quitoriano, 268 Cal. App. 2d 807, 811-12, 74 Cal. Rptr. 358 (1969). The court held that the class action was not barred by failure to exhaust administrative remedies. The court explained that even though comprehensive administrative procedures existed to allow DSS to supervise county welfare programs, such procedures did not provide for the review of a class action claim that a county's program violated the relevant statutes and DSS regulations. Therefore, the court found no remedy was available to the class members making the exhaustion of remedies doctrine inapplicable. Id. at 812-13.

Here, by applying the reasoning in Jacobellis and Diaz, a right of action for declaratory relief may be implied. First, the class members are applicants for welfare benefits distributed by the County of San Diego. First Amended Compl., P 39. As such, they fall within the class of persons meant to be protected by the CalWORKs statutes and regulations, here MPP §§ 40-157.22 and 19-007.1. Second, allowing class members to sue to enforce valid DSS regulations would further the purpose behind distribution of public social services which is to provide "appropriate aid and services to all [California's] needy and distressed," and to ensure that such "aid . . . and services [are] provided promptly and humanely." Cal. Welf. & Inst. Code § 10000. Moreover, as noted above, the legislature has already declared its intent that private persons be allowed to file

actions for declaratory relief concerning the validity of DSS regulations (see Cal. Gov. Code § 11350). Consequently, the court's role in reviewing county procedures for compliance with state statutes and DSS regulations is no different than in an action challenging the validity of the DSS regulations because DSS regulations are binding upon the county procedures just as the CalWORKs statutes are binding upon DSS regulations. See Ramos v. County of Madera, 4 Cal. 3d 685, 695, 94 Cal. Rptr. 421, 484 P.2d 93 (1971) (holding counties possess purely ministerial authority in ensuring applicants are eligible for welfare benefits and are bound by eligibility criteria established by DSS regulations). Third, a private action to enforce the regulations appears to be necessary to provide relief from invalid county procedures. As explained in Diaz v. Quitoriano, 268 Cal. App. 2d 807, 74 Cal. Rptr. 358 (1969), the comprehensive regulatory scheme governing receipt of state-administered welfare benefits does not provide a remedy for class complaints. A class action, then, may work to provide broad-based relief which is not available through the individualized review process. Therefore, even assuming that the provision for declaratory relief actions under California Government Code § 11350 does not directly apply to this case, the court concludes that the legislature has demonstrated an intent to allow a private right of action to enforce the statutes and regulations governing California's administration of welfare benefits.

Turning to plaintiffs' request for reconsideration, plaintiffs argue that it was clear error for the court to not rule in their favor on the MPP claims in their ninth cause of action. Yet, plaintiffs fail to cite any authority that a court is required to rule on a claim where a party did not raise the specific claim in its motion for summary judgment. In this case, plaintiffs simply did not raise the claims under MPP §§ 40-157.22 and 19-007.1 in their briefs on the cross-motion for summary judgment.

However, the court *may* sua sponte grant judgment in favor of a party opposing summary judgment where the moving party has received adequate notice and a reasonable opportunity to present an opposition to the nonmoving party's position. See Kassabaum v. Steppenwolf Productions, Inc., 236 F.3d 487, 494-95 (9th Cir. 2000) (explaining general rule that a court may sua sponte grant summary judgment in favor of opposing party where moving party had adequate notice and reasonable opportunity to present opposition). In this case, the parties agree that the issue before the court, whether the use of SIUs to make collateral contacts without an applicant's consent violates MPP §§ 40-157.22 and 19-007.1, is a matter of law to be decided by the court. It is undisputed that the SIUs do not follow the above MPP provisions in gathering eligibility information for Project 100% purposes. Additionally, the parties have fully briefed the issue before the court both in these motions and on the previous cross-motions. Therefore, the court proceeds to reach the merits of plaintiffs' argument on these claims. However, the court first addresses defendants' motion for a continuance pursuant to Federal Rule of Civil Procedure 56(f).

Defendants, in the alternative to arguing that no private right of action exists to enforce the MPP sections at issue, move, pursuant to Rule 56(f), to continue any ruling on plaintiffs' motion until DSS has an opportunity to interpret the relevant MPP provisions. Defendants submit an affidavit stating DSS has been contacted and that an interpretation would not be forthcoming for several months. Yet, what is notably missing from the affidavit and defendants' request is any mention that DSS has agreed to interpret the MPP sections before the court. Moreover, defendants made no effort to obtain such interpretations prior to the hearing date for the cross-motions for summary judgment. Consequently, defendants' Rule 56(f) motion is denied. See Stitt v. Williams, 919 F.2d 516, 526 (9th Cir. 1990) (no abuse of

discretion where court denied Rule 56(f) motion since party had adequate opportunity to conduct discovery prior to summary judgment hearing).

Lastly, the court addresses plaintiffs' argument that they are entitled to summary judgment on the remaining claims under MPP §§ 40-157.22 and 19-007.1.[4] Initially, plaintiffs point out that MPP § 20-007.33 prohibits SIUs from conducting mass or indiscriminate searches and that this court ruled § 20-007.33 does not apply in this case. This court reasoned that, under Project 100%, the Public Assistance Fraud Division ("PAFD") investigators who conduct the home visits are not acting as SIUs but as eligibility information gatherers. Rulings on Cross-Motions for Summary Judgment, 24:11-25:10. As such, the court concluded that the prohibition on mass and indiscriminate home visits by SIUs did not apply since that prohibition was meant to impact the SIUs when acting in a criminal

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[4] MPP § 40-157.22 provides:

> When needed in the evidence gathering process, and as evidence of the applicant's consent thereto, a specific consent form, signed by the applicant and, if necessary, by the spouse (by both parents in AFDC when this is possible) shall be obtained for each such contact.

Department of Social Services Manual of Policies and Procedures § 40-157.22.

> Additionally, MPP § 19-007.1 states: Pursuant to EAS Sections 40-157.22 and 40-181.31 individual consent forms, signed by the applicant or recipient are required for each contact made during the evidence gathering process. An exception to this rule is found in MPP Section 20-007.36 which exempts SIUs from the requirement of permission to contact collateral sources.

Department of Social Services Manual of Policies and Procedures § 19-007.1.

investigatory capacity. In this light, then, the court must consider whether the PAFD investigators are subject to MPP §§ 40-157.22 and 19-007.1 which require that an applicant consent before collateral contacts maybe made to gather eligibility information, or, instead, fall within the exception that allows SIUs to make collateral contacts without such consent under MPP § 20-007.6.[5]

Here, as mentioned above, the court has concluded that the PAFD investigators are not acting as investigative units as intended under the MPP. Instead, the investigators conduct the home visits to gather eligibility information which is then reported to the eligibility technicians. As such, the PAFD investigators role under project 100% is more akin to that of eligibility technicians who may not make third party contacts without the consent of the applicant. See MPP § 19-007.1. Therefore, the PAFD investigators are subject to the provisions of MPP §§ 40-157.22 and 19-007.1 and do not fall within the exception to these provisions stated in MPP § 20-007.6.

CONCLUSION

For the above stated reasons, the court **denies** defendants' renewed summary judgment motion and **denies** defendants' request for a continuance under Federal Rule of Civil Procedure 56(f). Furthermore, the court **grants** judgment in plaintiffs' favor on the claims under MPP §§ 40-157.22 and 19-007.1.

Consequently, the court **declares** that the County of San Diego Project 100% practice of using PAFD investigators to

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[5] MPP § 20-007.36 provides that a special investigative unit ("SIU") shall "[n]ot be bound by the restrictions placed on eligibility determinations in Section 40-157.22 requiring recipient/applicant permission to contact collateral sources." Department of Social Services Manual of Policies and Procedures § 20-007.36.

make collateral contacts without the consent of the applicant violates MPP §§ 40-157.22 and 19-007.1. Pursuant to Federal Rule of Civil Procedure 65, the court hereby **enjoins** defendants from making such collateral contacts under Project 100% without complying with MPP §§ 40-157.22 and 19-007.1.

It is further ordered that the word "plaintiffs" on page 26 line 23 in the court's March 7, 2003 order, be changed to "defendants."

IT IS SO ORDERED.

DATED: 5/9, 2003

s/_____

JEFFREY T. MILLER

United States District Judge

cc: all parties

APPENDIX E

Rocio SANCHEZ; Olga Castro; Myrna Martinez; Karen Bjorland; Cheryl MacLyman; Rhonda Kern, Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; San Diego County Board of Supervisors; San Diego County Department of Health and Human Services; Steven Escoboza, Director of the San Diego County Health and Human Services Agency, in his official capacity; San Diego Office of District Attorney; Paul Pfingst, District Attorney of the County of San Diego, in his official capacity, Defendants-Appellees,

and

Aurora, on behalf of themselves and all others similarly situated, Defendant.

No. 04-55122.

United States Court of Appeals, Ninth Circuit.

April 16, 2007.

Eric Alan Isaacson, Lerach Coughlin Stoia Geller Rudman & Robbins, LLP, San Diego, CA, for Plaintiffs-Appellants.

Thomas D. Bunton, Senior Deputy County Counsel, County of San Diego Office of County Counsel, San Diego, CA, for Defendants-Appellees.

Before KLEINFELD, TASHIMA, and FISHER, Circuit Judges.

Prior report: 464 F.3d 916 (2006).

ORDER

Judge Kleinfeld voted to deny the petition for rehearing en banc, and Judge Tashima so recommended. Judge Fisher voted to grant the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge of the court called for a vote on whether to rehear the matter en banc. On such a vote, a majority of the active judges failed to vote in favor of en banc rehearing.

The petition for rehearing en banc is **DENIED.**

PREGERSON, Circuit Judge, dissenting, joined by REINHARDT, WARDLAW, WILLIAM A. FLETCHER, FISHER, PAEZ, and BERZON, Circuit Judges:

I dissent from the denial of the petition for rehearing en banc. I disagree with the majority's decision and strongly believe that this case requires en banc review. This case strikes an unprecedented blow at the core of Fourth Amendment protections. The majority opinion clings to *Wyman v. James,* 400 U.S. 309, 91 S. Ct. 381, 27 L. Ed. 2d 408 (1971), asserting that it directly controls this case. This is unsupportable for three reasons. First, as clearly outlined in Judge Fisher's dissent, the program upheld in *Wyman* was significantly different in scope and goal from San Diego's

program. Second, allowing *Wyman* to constrict the bounds of our Fourth Amendment jurisprudence ignores over thirty-five years of intervening law. Third, allowing this opinion to stand is an assault on our country's poor as we require them to give up their rights of privacy in exchange for essential public assistance.

I. *Wyman v. James* Does Not Control This Case

"Project 100%" is a mandatory part of San Diego's public assistance program. The San Diego District Attorney's Public Assistance Fraud Division created and operates the program. Applicants for cash assistance who are eligible and *not* suspected of fraud must consent to a warrantless home "walk through" or face denial of aid. Project 100% is part of the county's early fraud prevention and detection program. The visits are conducted by District Attorney investigators seeking to identify welfare fraud. These investigators are sworn peace officers with a duty to look for and report evidence of crimes. San Diego makes no claim that the visits are intended to serve any rehabilitative function.

The majority holds that *Wyman* "directly controls" this case. The majority states, "because we are bound by *Wyman*, we conclude that the Project 100% home visits do not qualify as searches within the meaning of the Fourth Amendment." *Id.* at 922-23. The majority also holds that even if the home visits are searches, they "are reasonable under the Supreme Court's decision in *Wyman*." *Id.* at 925. However, the facts here differ fundamentally from those in *Wyman*, and *Wyman* does not dictate the conclusion that home visits are not searches. Nor does *Wyman* require the court to find that these searches are reasonable. To the contrary, following the roadmap in *Wyman* leads to the conclusion that the home "walk throughs" in *Sanchez* are searches and are far too intrusive to be reasonable.

Wyman addressed legal questions only in the context of the factual circumstances presented. Judge Fisher's dissent highlights fundamental differences between the home visitation program at issue in *Wyman* (structured by New York statutes and regulations, and executed by social workers) and the one at issue in *Sanchez* (structured by the San Diego D.A.'s office and executed by fraud investigators). Of particular note: San Diego's Project 100% entails physical "walk through" inspections of applicants' homes designed specifically to search for evidence of crime or fraud, while the New York program explicitly prohibited such searching. Whether a particular home visitation program qualifies as a search under the Fourth Amendment is a question of law applied to facts. Recognizing this, the *Wyman* Court emphasized that its analysis applied only to the facts presented; the Court left open the possibility that other home visits might be unconstitutional. *See Wyman*, 400 U.S. at 326, 91 S. Ct. 381.

The differences between San Diego's program and the program in *Wyman* are of a quality and character that cannot be ignored. *See Sanchez*, 464 F.3d at 933-36 (Fisher, J., dissenting). But by doing just that, the majority opinion extends *Wyman* to uphold an unreasonable search program. *Wyman* and *Sanchez* share a phrase: "home visits," but we cannot rest our legal analysis on the common use of these two words—a general phrase that reveals nothing about the purpose or nature of the "visit." We must look more closely at the facts, not just the language, of each case. And the simple fact of the matter is that a home visit in *Sanchez* is fundamentally different from a home visit in *Wyman*.

II. Fourth Amendment Jurisprudence

The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. *Chandler v. Miller*, 520 U.S. 305, 308, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997). Inexplicably, the majority opinion holds that highly intrusive, unannounced suspicionless home visits are not "searches" under the Fourth Amendment. *Sanchez*, 464 F.3d at 920. The Supreme Court has repeatedly held, however, that any conduct by a government agent that intrudes upon a person's reasonable expectation of privacy is a search or seizure under the Fourth Amendment. *See, e.g.*, *Katz v. United States*, 389 U.S. 347, 359, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Smith v. Maryland*, 442 U.S. 735, 739-40, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979); *Kyllo v. United States*, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). No matter how minor the intrusion, the conduct must still be scrutinized under the Fourth Amendment. A minor intrusion will militate toward a judicial finding of reasonableness under the Fourth Amendment, but it does not exempt the conduct from all scrutiny or remove the conduct from the definition of a "search." *See Delaware v. Prouse*, 440 U.S. 648, 653-54, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555-56, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976). Fourth Amendment searches occur when "the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 U.S. at 33, 121 S. Ct. 2038.

The majority relies on *Wyman* to hold that home visits related to welfare programs are never "searches." Under this rubric, we would not even need to determine whether the visits are reasonable or whether there is a special need for the enforcement as is required under a Fourth Amendment

analysis (and thoroughly analyzed in Judge Fisher's dissent). Instead, the majority simply denies the plain fact that these highly intrusive home visits and walk-throughs looking for evidence of welfare fraud or other wrong doing are "searches." *Sanchez*, 464 F.3d at 920.[1]

The majority couches its opinion in terms of upholding precedents, but it hits at the core of established Fourth Amendment protections. The Supreme Court has described such rights as "basic to a free society." *Wolf v. Colorado*, 338 U.S. 25, 27, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). In fact, the Court has specifically pointed to the fundamental right we all have to privacy in our own homes. *Kyllo*, 533 U.S. at 33, 121 S. Ct. 2038; *see also Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). An individual's home lies at the zenith of privacy interests. *See, e.g., United States v. Scott*, 450 F.3d 863, 871 (9th Cir. 2006) (as amended); *Payton*, 445 U.S. at 586, 100 S. Ct. 1371 ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable.") (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)).

The majority makes much of the purportedly consensual nature of the Project 100% searches-asserting that they lower the plaintiffs' expectation of privacy and make the intrusive character of the "walk through" acceptable. *Sanchez*, 464 F.3d at 927. But there can be no true consent here. Applicants are not given notice of when the visit will occur;

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[1] The majority also states that even if we were to consider the home visits to be searches, they are reasonable searches. *Sanchez*, 464 F.3d at 923. As the majority notes that it "need not reach the question" of the reasonableness of the search, that portion of the majority decision is merely dicta, unnecessary to reach the majority's holding. *Id.* at 923-28.

they are not informed of their right to withhold consent; they are told the visit is mandatory; and they are aware of the severe consequences of refusing the search.

III. This Case Is an Assault on the Poor

San Diego's program requires destitute, often disabled, persons and their families to forfeit all rights to privacy to qualify for welfare. The government's general interest in preventing fraud cannot justify such highly intrusive searches of homes where no grounds for suspicion exist. Welfare applicants are ordinary people who, due to lack of adequate funds, find themselves applying for life-sustaining government benefits.

As the panel majority notes, we stated in *Scott* that the "government may sometimes condition benefits on waiver of Fourth Amendment rights-for instance, when . . . paying welfare benefits." 450 F.3d at 867-68 (citing *Wyman,* 400 U.S. at 317-18, 91 S. Ct. 381). But the majority conveniently omits the end of the quoted sentence. Importantly, we went on to say that the government's power in this respect "is not unlimited." *Id.* at 868.[2] Here, San Diego has created a wholly unreasonable search program, far beyond that which could be legitimated by the waiver of individuals. *See id.* (explaining that consent to any search is only valid to the extent that the search is reasonable, "taking the fact of consent into account" as "merely a relevant factor").

Sanchez presents the enormously important issue of the legality of mandatory home searches of innocent persons

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[2] The precedent cited to support that assertion in *Scott* was *Wyman.* As Judge Fisher's dissent cogently notes at footnote 13, *Scott*'s reference to *Wyman* for this proposition is limited by *Wyman* itself, and the instant case goes far beyond the realm of what is permitted by *Wyman.*

based solely on their need for welfare assistance. California's fifty-seven other counties do not have programs in place that go as far as San Diego's Project 100%, but this ruling will surely set the new standard. It is fair to expect that counties throughout the Ninth Circuit may change their programs to take advantage of the legal latitude the ruling in *Sanchez* affords them. The intrusion here is the unannounced search of the home of a person under no suspicion whatsoever by fraud investigators, who are required not only to question the applicant but to pry into the applicant's most private spaces—to look through drawers, medicine cabinets, closets, garbage, and the like. Comparison to *Wyman* and the more recent line of special needs cases reveals the utterly unreasonable nature of this search program. The facts of *Sanchez* place the panel majority's ruling in new and untenable territory.

This case is nothing less than an attack on the poor. San Diego's program strips these individuals of their rights of privacy. These people who are already suffering from disabilities, loss of work, and other hardships must then suffer humiliation and further assaults on their dignity. This is especially atrocious in light of the fact that we do not require similar intrusions into the homes and lives of others who receive government entitlements. The government does not search through the closets and medicine cabinets of farmers receiving subsidies. They do not dig through the laundry baskets and garbage pails of real estate developers or radio broadcasters. The overwhelming majority of recipients of government benefits are not the poor, and yet this is the group we require to sacrifice their dignity and their right to privacy. This situation is shameful. This case should have been considered by the en banc court, and it should have been reversed.

KOZINSKI, Circuit Judge, dissenting from the order denying the petition for rehearing en banc:
I dissent for the reasons expressed in Judge Fisher's trenchant panel dissent.

APPENDIX F

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s/ [illegible]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ROCIO SANCHEZ, et al,	)	No. 00cv1467-JM(JFS)
	)	
Plaintiffs,	)	~~[PROPOSED]~~
	)	JUDGMENT
v.	)	
	)	Courtroom: 6, Third Floor
COUNTY OF SAN DIEGO,	)	The Honorable
et al.,	)	Jeffrey T. Miller
	)	
Defendants.	)	

On March 7, 2003, this Court issued an order ruling on the parties' cross-motions for summary judgment. In that order, the Court granted the defendants' motion for summary judgment on all claims except for plaintiffs' claim for violation of 7 C.F.R. § 273.2(f)(4)(iii) and plaintiffs' claim for violations of Manual of Policies and Procedures ("MPP") sections 40-157.22 and 19-007.

ENTERED ON 1-5-04

On May 9, 2003, this Court issued an order ruling on the defendants' motion for summary adjudication regarding MPP sections 40-157.22 and 19-007 and plaintiffs' motion for reconsideration of the denial of their motion for summary judgment on those sections. In that order, the Court denied the defendants' motion for summary adjudication and "declare[d] that the County of San Diego's Project 100% practice of using PAFD investigators to make collateral contacts without the consent of the applicant violates MPP §§ 40-157.22 and 19-007.1" and "enjoin[ed] defendants from making such collateral contacts under Project 100% without complying with MPP §§ 40-157.22 and 19-007.1."

On December 12, 2003, this Court approved a partial settlement resolving plaintiffs' claims for violating the federal food stamp regulations, including 7 C.F.R. § 273.2(f)(4)(iii), finding it fair, reasonable, adequate, and in the best interests of the class.

IT IS THEREFORE HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

That the practice of defendants County of San Diego, San Diego County Board of Supervisors, San Diego County Health and Human Services Agency, Rodger G. Lum, Director of the San Diego County Health and Human Services Agency, in his official capacity, Office of the San Diego County District Attorney and Bonnie M. Dumanis, District Attorney of the County of San Diego, in her official capacity, of using PAFD investigators to make collateral contacts without the consent of the applicant as part of Project 100% violates MPP §§ 40-157.22 and 19-007.1

That defendants County of San Diego, San Diego County Board of Supervisors, San Diego County Health and Human Services Agency, Rodger G. Lum Director of the San Diego

County Health and Human Services Agency, in his official capacity, Office of the San Diego County District Attorney and Bonnie M. Dumanis, District Attorney of the County of San Diego, in her official capacity, are enjoined from making collateral contacts under Project 100% without complying with MPP §§ 40-157.22 and 19-007.1.

That the parties are, in addition, hereby directed to perform the terms of the partial settlement approved by this Court on December 12, 2003.

That without affecting the finality of this Judgment in any way, this Court hereby retains continuing jurisdiction over any issue arising with respect to compliance with this order and implementation of the partial settlement.

That plaintiffs take nothing on the remaining claims alleged in their complaint, and those claims are dismissed on the merits.

DATED: 12/31/03

s/_____

HONORABLE JEFFREY T. MILLER

JOHN J. SANSONE, County Counsel
County of San Diego
By THOMAS D. BUNTON, Senior Deputy (SBN 193560)
DAVID G. AXTMANN, Senior Deputy (SBN 100176)
1600 Pacific Highway, Room 355
San Diego, California 92101-2469
Telephone: (619) 531-6456
(619) 531-5649
Facsimile: (619) 531-6005
Attorneys for Defendants County of San Diego, et al.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROCIO SANCHEZ, et al.,	)	No. 00cv1467-JM(JFS)
	)	
Plaintiffs,	)	**PROOF OF SERVICE**
	)	**BY MAIL**
v.	)	
	)	Date Served: July 15,
COUNTY OF SAN DIEGO,	)	2002
et al.,	)	
	)	Persons Served:
Defendants.	)	**Attorneys for Plaintiffs**
	)	Jordan C. Budd, Esq.
	)	Robert Newman, Esq.
	)	Rosemary H. Bishop, Esq.
	)	Eric Isaacson, Esq.

I, ROSANNA LONERO-BONGOLAN, declare that: I am over the age of eighteen years and not a party to the case; I am employed in the County of San Diego, California where the mailing occurs; and my business address is: 1600

Pacific Highway, Room 355, San Diego, California.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

I served the following documents(s):

[Proposed] JUDGMENT

by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

Jordan C. Budd, Esq.
Elvira Cacciavillani, Esq.
ACLU Foundation of San Diego & Imperial Counties
Post Office Box 87131
San Diego, CA 92138-7131
Telephone: (619) 232-2121
Facsimile: (619) 232-0036

Robert D. Newman, Esq.
Richard A. Rothschild, Esq.
Western Center on Law & Poverty, Inc.
3701 Wilshire Blvd., Suite 208
Los Angeles, CA 90010-2809
Telephone: (213) 487-7211
Facsimile: (213) 487-0242

Rosemary H. Bishop, Esq.
San Diego Volunteer Lawyer Program
625 Broadway, Suite 925
San Diego, CA 92101
Telephone: (619) 235-5656 x123
Facsimile: (619) 235-5668

Amber Eck, Esq.
Milberg, Weiss, Bershad, Hynes & Lerach, LLP
401 B Street, Suite 1700
San Diego, CA 92101
Telephone: (619) 231-1058
Facsimile: (619) 231-7423

ALL ATTORNEYS FOR PLAINTIFFS

I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 16, 2003 at San Diego, California.

s/_____
R. LONERO-BONGOLA

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(2)

No. 07-211

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In The

Supreme Court of the United States

ROCIO SANCHEZ; OLGA CASTRO; MYRNA MARTINEZ; KAREN BJORLAND; CHERYL MACLYMAN and RHONDA KERN On Behalf of Themselves and All Others Similarly Situated,

Petitioners,

vs.

COUNTY OF SAN DIEGO; SAN DIEGO COUNTY BOARD OF SUPERVISORS; SAN DIEGO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES; JEAN SHEPARD, Director Of The San Diego County Health And Human Services Agency, in her official capacity; SAN DIEGO OFFICE OF DISTRICT ATTORNEY; BONNIE DUMANIS, District Attorney Of The County Of San Diego, in her official capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN J. SANSONE, County Counsel
COUNTY OF SAN DIEGO
THOMAS D. BUNTON, Senior Deputy*
1600 Pacific Highway, Room 355
San Diego, California 92101-2469
(619) 531-6456
Attorneys for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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QUESTION PRESENTED

Whether the County of San Diego's home visit program violates the Fourth Amendment where applicants are free to refuse entry into their homes, and the purpose of the home visit is to confirm eligibility for welfare benefits, not to locate evidence of criminal conduct?

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BRIEF IN OPPOSITION

Respondents County of San Diego; San Diego County Board of Supervisors; San Diego County Department of Health and Human Services; Jean Sheppard, Director of the San Diego County Health and Human Services Agency, in her official capacity; San Diego Office of District Attorney; and Bonnie Dumanis, District Attorney of the County of San Diego, in her official capacity (collectively the "County") respectfully submit this opposition to the Petition for a Writ of Certiorari filed by petitioners Rocio Sanchez, Olga Castro, Myrna Martinez, Karen Bjorland, Cheryl Maclyman, and Rhonda Kern.

INTRODUCTION/SUMMARY OF ARGUMENT

This case involves a challenge to a program adopted by the County of San Diego (the "County") requiring its employees to confirm through a home visit that all applicants for CalWORKs benefits (commonly known as welfare) are eligible for those benefits. The name of this program is "Project 100%."

Petitioners' Fourth Amendment challenge to the County's home visit program was correctly rejected by the district court and the Ninth Circuit. Petitioners urge the Court to grant the Petition because they contend that the Ninth Circuit's decision in this case conflicts with the Seventh Circuit's decision in *S.L. v. Whitburn*, 67 F.3d 1299 (7th Cir. 1995), examining a similar home visit program. However, those decisions

do not conflict at all. In both cases, relying on this Court's decision in *Wyman v. James*, 400 U.S. 309 (1971), the courts of appeals held that the home visits were not searches governed by the Fourth Amendment and that even if they were searches they were reasonable. In addition, the courts of appeal applied this Court's "special needs" cases in confirming that no search warrant was necessary. Despite petitioners' assertion to the contrary, the Seventh Circuit did not conclude, in direct contravention of *Wyman*, that the home visits would have violated the Fourth Amendment if they had been a condition of receiving welfare benefits.

Recognizing that (a) only two courts of appeals decisions have applied *Wyman* to home visit programs used to confirm eligibility for welfare benefits in the past thirty-six years and (b) that the two courts of appeals decisions are consistent, petitioners try to create a conflict by lumping all "home entries by government officials in the social-services context" together. This approach is unavailing. The cases cited by petitioners involve highly individualized investigations of child abuse. The courts of appeals have had no trouble distinguishing between systematic home visits for the purpose of confirming eligibility for welfare benefits and home entries made based on individualized suspicion of child abuse.

Next, petitioners urge the Court to grant certiorari because the *Wyman* court's initial holding that the home visits are not searches within the meaning of the Fourth Amendment is purportedly inconsistent

with later decisions from the Court addressing other administrative "searches." This is hardly a pressing issue that needs this Court's attention because only two courts of appeals decisions in the past thirty-six years have considered whether home visits used to confirm eligibility for welfare benefits are searches within the meaning of the Fourth Amendment. Moreover, in each of those cases the courts of appeals went on to consider whether the searches were reasonable, assuming that they were Fourth Amendment searches. In performing this analysis, the courts of appeals also considered this Court's subsequent "special needs" cases. Thus, there is almost no chance that a lower court will reach a conclusion that is inconsistent with *Wyman* or the Court's other Fourth Amendment cases.

Finally, the Ninth Circuit's determination that the County's home visits do not violate the Fourth Amendment is consistent with this Court's decision in *Wyman*. Petitioner's effort to distinguish the facts of this case from the home visits at issue in *Wyman* is not persuasive. The Ninth Circuit properly rejected petitioners' contentions.

STATEMENT OF THE CASE

San Diego County residents who apply for CalWORKs[1] benefits and who are not suspected of being ineligible for those benefits automatically participate in Project 100%.[2] (ER 81 Ex. 2 at 1, ¶ 6 (Agreement), Ex. 4 at 1, ¶ 3 (Program Summary)).[3] All participants

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[1] In 1996, Congress passed landmark welfare reform legislation in the form of the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996." This legislation replaced the Aid to Families with Dependent Children program ("AFDC") with the Temporary Assistance for Needy Families program ("TANF") and provided assistance to transition individuals from welfare to work. 42 U.S.C. § 601 et seq.

As required by the federal legislation, California adopted the Welfare to Work Act of 1997 and established CalWORKs (California Work Opportunity and Responsibility to Kids). Cal. Welf. & Inst. Code § 11200 et seq. CalWORKs has two components. One component provides cash assistance to needy California families. *Id.* at § 11250 et seq. This cash assistance is provided for a lifetime maximum of five years. *Id.* at § 11454. The other component provides assistance to help recipients transition from welfare to work. *Id.* at § 11320 et seq. Only the cash assistance component of CalWORKs is at issue in this lawsuit.

San Diego County and the other fifty-seven counties in California are responsible for administering the CalWORKs program in conformity with federal and state laws and regulations. *Id.* at §§ 10802, 11209. Federal, state and county governments jointly provide funding for CalWORKs. *Id.* at § 10100 et seq.; 42 U.S.C. § 603.

[2] If the County has some reason to suspect that the applicant is ineligible for benefits, the applicant does not participate in Project 100%. (ER 81 Ex. 4 at 1, ¶ 3 (Program Summary)).

[3] "ER" refers to the Excerpts of Record filed in the Ninth Circuit.

in Project 100% receive a home visit so that the County can confirm their eligibility for benefits. (ER 81 Ex. 4 at 1, ¶ 1 (Program Summary)). The home visit has two primary components – an interview followed by a "walk through" of the applicant's residence. (ER 85 Ex. 14 at 44:7-18 (Reid Depo.); ER 81 Ex. 7 (Program Summary)).

The purpose of the home visit is to view items confirming that: (1) the applicant has the amount of assets claimed; (2) the applicant has an eligible dependent child; (3) the applicant lives in California; and (4) an "absent" parent does not live in the residence. (ER 81 Ex. 8 (Eligibility Factors)).

The home visits are conducted by Public Assistance Investigators ("investigators") employed by the San Diego County District Attorney's Office ("D.A.'s Office"). (ER 81 Ex. 9 at 1 (Program Summary)). The investigators are not prosecutors or police. They do not carry weapons of any kind, do not wear uniforms, and have no authority to arrest individuals. (ER 81 Ex. 10 at 1 (memo), Ex. 10 at 15:12-15 (Crosby Depo.), Ex. 10 at 58:17-19 (Bogard Depo.); ER 79 at 2, ¶ 6 (Crosby Decl.)). Generally, only one investigator makes the home visit. (ER 79 at 1, ¶ 2 (Crosby Decl.)).

Applicants are informed in advance that an investigator will come to their residence to confirm their eligibility for CalWORKs benefits. A one-page notice of the home visit is contained in the CalWORKs application. (ER 81 Ex. 11 (Notice)). Eligibility technicians ("ETs") also tell the applicants that an

investigator will be coming to their residence. (ER 81 Ex. 12 at 111:10-20 (Deguzman Depo.)).

The home visits are generally conducted within ten days of the applicant's initial interview with the County's Health and Human Services Agency ("HHSA"). (ER 81 Ex. 13 at 104:11-16 (Crosby Decl.), Ex. 13 at 36:3-6 (Reid Depo.)). However, if the applicant is not at home on the day of the visit, the investigator will leave his or her business card with a note asking the applicant to call the investigator. (ER 81 Ex. 4 at 1, ¶ 6 (Program Summary), Ex. 14 at 46:19-47:12 (Crosby Depo.), Ex. 14 at 73:10-21 (Gonzalez Depo.)). When the applicant calls, an appointment will be scheduled for the home visit. (ER 81 Ex. 15 at 56:17-57:3 (Bogard Depo.)). If the applicant is not at home at the scheduled time of the appointment, the investigator will leave another business card asking the applicant to call. (ER 81 Ex. 4 at 1, ¶ 6 (Program Summary), Ex. 16 at 75:23-76:4 (Duvall Depo.)). If after several days the applicant has not called, the investigator will report this information to the responsible ET and the application will be denied.[4] (ER 81 Ex. 4 at 1, ¶¶ 6, 8 (Program Summary)).

The home visits are made during regular business hours (usually between 8 a.m. and 5 p.m.),

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[4] Some investigators may attempt more than two home visits before reporting to the ET that no home visit could be made because of the applicant's unavailability. (ER 81 Ex. 17 at 62:21-64:17 (Reid Depo.)).

unless a different time is required to accommodate an applicant's schedule. (ER 81 Ex. 19 at 72:14-73:5 (Gonzalez Depo.)). The investigators are trained to be professional, courteous and respectful to the applicant during the home visit. (ER 81 Ex. 20 at 1, ¶ B (Training Manual), Ex. 20 at 88:19-89:24 (Gonzalez Depo.)). When an investigator arrives at an applicant's residence for the home visit, she identifies herself and asks the applicant whether she is willing to answer some questions. (ER 81 Ex. 21 at 1, ¶ II (Program Manual), Ex. 21 at 46:15-20, 47:16-22 (Duvall Depo.)). If the applicant says no, the home visit terminates and the investigator leaves. (ER 79 at 2, ¶ 5 (Crosby Decl.)). The interview may be conducted outside the applicant's residence or inside the residence if the applicant invites the investigator inside. (ER 81 Ex. 23 at 39:1-21 (Reid Depo.), Ex. 23 at 40:22-41:6 (Crosby Depo.)). If the interview is conducted outside the residence, the investigator will ask the applicant's permission to enter the residence. If permission is denied, the investigator leaves and terminates the home visit. (ER 81 Ex. 24 at 41:7-10 (Crosby Depo.), Ex. 24 at 65:25-66:11 (Gonzalez Depo.)).

Once inside, the investigator will ask the applicant to lead a walk through of the residence. (ER 81 Ex. 25 at 1, ¶ B (Program Guide), Ex. 25 at 1 (Training Bulletin), Ex. 25). Often the walk through occurs as a result of the investigator's request to be shown specific items such as clothes belonging to the applicant. (ER 81 Ex. 26 at 55:5-22 (Reid Depo.)). The

investigator will not walk through the residence unless escorted by the applicant. (ER 81 Ex. 27 at 1 (Training Bulletin), Ex. 27 at 69:1-10 (Bogard Depo.)). If the investigator wants to look at any objects not in plain view, she will ask the applicant to open a closet, medicine cabinet, dresser drawer, etc. (ER 81 Ex. 28 at 1 (Training Bulletin), Ex. 28 at 80:10-19 (Gonzalez Depo.), Ex. 28 at 54:6-15 (Duvall Depo.), Ex. 28 at 70:3-10 (Bogard Depo.)). If the applicant refuses, the investigator will not view objects outside plain view. (ER 81 Ex. 29 at 57:19-21 (Duvall Depo.)). The walk through generally takes five to ten minutes. (ER 85 Ex. 7 at 74:12-18 (Duvall Depo.)). Once the investigator completes a home visit, she transmits her findings electronically to the ET assigned to the applicant's file. (ER 81 Ex. 37 at 23:20-25 (Gonzalez Depo.)). The ETs are employed by HHSA. (ER 81 Ex. 38 at 75:23-25; ER 79 at 2, ¶ 7 (Crosby Decl.)). The ETs, and not the investigators, decide whether to approve CalWORKs benefit applications. (ER 81 Ex. 39 at 65:4-10 (Gonzalez Depo.), Ex. 39 at 31:9-11(Bogard Depo.); ER 79 at 2, ¶ 7 (Crosby Decl.)).

If an applicant refuses to allow a home visit, the applicant is not criminally prosecuted. (ER 79 at 2, ¶ 5 (Crosby Decl.)). Indeed, refusal to allow a home visit will not result in any criminal or civil penalty. The only consequence of refusing to allow a home visit is that the application for CalWORKs benefits will be denied. (ER 81 Ex. 40 at 38:13-39:16 (Crosby Depo.)). No applicant has been prosecuted for welfare fraud based upon anything observed or discovered

during a home visit that contradicted information provided by the applicant. (ER 81 Ex. 43 at 89:4-10, 157:1-4, 177:12-25, 191:20-192:6).

A. Proceedings Below.

On March 10, 2003, the district court ruled on the parties cross-motions for summary judgment. (ER 138). The district court granted summary judgment in favor of the County on petitioners' Fourth Amendment claim. Based on *Wyman*, the district court concluded that the home visits are not searches within the meaning of the Fourth Amendment. (*Id.* at 6). Further, the district court concluded that even if the home visits were searches, they are reasonable under this Court's holding in *Wyman* and this Court's subsequent "special needs" cases. (*Id.* at 6-13). Judgment was entered in favor of the County on the Fourth Amendment claim on January 5, 2004. (ER 162).[5]

The Ninth Circuit affirmed the district court's decision. In a 2-1 opinion written by Judge A. Wallace Tashima (joined by Judge Andrew J. Kleinfeld), the Ninth Circuit concluded that the home visits do not violate the Fourth Amendment. *Sanchez v. County of San Diego*, 464 F.3d 916 (9th Cir. 2006). The Ninth Circuit found that under this Court's holding in *Wyman*, the home visits are not searches within the

[5] The County omits discussion of petitioners' claims that are not at issue in this Petition for a Writ of Certiorari.

meaning of the Fourth Amendment. The Ninth Circuit also concluded that even if the home visits were searches they were reasonable and did not violate the Fourth Amendment. Finally, the court concluded that there was a special need for the home visits unrelated to law enforcement and therefore under this Court's "special needs" cases no warrant is needed to conduct the home visits. Judge Raymond C. Fisher filed a dissenting opinion.

The petitioners subsequently filed a Petition for Rehearing *En Banc* with the Ninth Circuit. The Ninth Circuit denied that Petition. *Sanchez v. County of San Diego*, 483 F.3d 965 (9th Cir. 2007). Judge Harry Pregerson filed a dissenting opinion that was joined by judges Stephen Reinhardt, Kim McLane Wardlaw, William A. Fletcher, Raymond C. Fisher, Richard A. Paez and Marsha S. Berzon. Judge Alex Kozinski wrote a separate one sentence dissent. Thus, eight of the Ninth Circuit's twenty-eight active judges dissented from the denial of rehearing *en banc*.

B. Proceedings In This Court.

Petitioners filed a Petition for a Writ of Certiorari in this Court on August 15, 2007. The Petition was placed on the docket August 17, 2007. On August 29, 2007, the Court granted the County a thirty-day extension of time to file this Opposition to the Petition for a Writ of Certiorari.

ARGUMENT

I

THE NINTH CIRCUIT'S DETERMINATION THAT THE HOME VISITS DO NOT VIOLATE THE FOURTH AMENDMENT IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DECISIONS FROM THE OTHER COURTS OF APPEALS

In finding that the County's home visits do not violate the Fourth Amendment, the Ninth Circuit primarily – but not exclusively – relied on this Court's 1971 decision upholding similar home visits in *Wyman*. In *Wyman*, the Court held that the home visits did not implicate the Fourth Amendment because the home visits were not searches. Alternatively, the Court held that even if the visits were Fourth Amendment searches, they were reasonable and therefore did not violate the Constitution.

Under the New York laws and regulations at issue in *Wyman*, ***all*** applicants for welfare benefits were required to have an initial home visit. 400 U.S. at 312 n.4. In addition, New York required that home visits be made every three months to confirm that the recipient remained eligible for welfare benefits. *Id.* at 312 n.3. The plaintiff in *Wyman* (Mrs. James) initially applied for welfare benefits and received a home visit from a caseworker employed by the New York City Department of Social Services. Mrs. James did not object to that home visit and began receiving benefits. Two years later, New York City informed Mrs. James

that a caseworker would need to make another visit to her home. Mrs. James indicated that she would not allow a home visit and the caseworker responded that if she did not do so her benefits would be terminated. Mrs. James subsequently challenged the home visit requirement in an administrative proceeding. Her challenge was denied and her benefits were terminated.

Mrs. James filed a federal lawsuit alleging, among other things, that the home visits violated her Fourth Amendment right to be free from unreasonable searches and seizures. This Court rejected Mrs. James' challenge to New York City's home visit program.

First, the Court held that the home visit did not rise to the level of a "search" within the meaning of the Fourth Amendment. The Court reasoned as follows:

> [W]e are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term. It is true that the governing statute and regulations appear to make mandatory the initial home visit and the subsequent periodic "contacts" (which may include home visits) for the inception and continuance of aid. ***It is also true that the caseworker's posture in the home visit is perhaps, in a sense,***

> ***both rehabilitative[6] and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context.*** We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.

Id. at 317-18 (emphasis added).

Second, the Court also held that even if the home visits were Fourth Amendment searches, they were reasonable. The Court based its holding upon the following factors: (1) by observing the child in the home, New York could assure that the child's best interests were being served; (2) New York had a "paramount interest and concern . . . in assuring" that the taxpayers money was being spent only on those who were eligible to receive welfare benefits; (3) the taxpaying public has an interest in knowing how its funds are being put to work and assuring that that they are being used properly; (4) home visits, while

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[6] "Rehabilitative" apparently refers to the fact that the New York Social Services law stated that the home visits were made, in part, "in order that any treatment or service tending to restore such persons to a condition of self-support and to relieve their distress may be rendered. . . ." *Id.* at 311 n.2.

not required by federal or state law, are an accepted practice in other jurisdictions; (5) the home visits are not done by forcible entry, under false pretenses, outside normal business hours and do not involve "snooping"; (6) not "all information pertinent" to eligibility could be obtained by an interview outside the house or by "examining a lease or a birth certificate, or by periodic medical examinations, or by interviews with school personnel"; (7) the home visits are not done by the "police or uniformed authority" and do not "deal with crime or the actual or suspected perpetrators of crime"; (8) the home visit "is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding";[7] and (9) requiring New York to obtain a warrant to make the home visit "is not without its seriously objectionable features in the welfare context," i.e., a warrant would justify entry by force, at virtually any hour, would imply criminal or noncompliant behavior, etc. *Id.* at 318-24.

The Court's determination that if the home visit was a search under the Fourth Amendment, the

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[7] The Court noted that "[i]f the visitation serves to discourage misrepresentation or fraud, such a byproduct of that visit does not impress upon the visit itself a dominant criminal investigative aspect." *Id.* at 323. Further, the Court stressed that "[i]f the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow . . . that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct." *Id.* (footnote omitted).

search was reasonable and no warrant was needed is perfectly consistent with this Court's subsequent "special needs" cases. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) ("Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be), we have permitted exceptions when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.") (citations and internal quotation marks omitted). Indeed, the Court discussed in detail why requiring a government entity to obtain a warrant for a welfare home visit would be impractical:

> The warrant procedure, which the plaintiff appears to claim to be so precious to her, even if civil in nature, is not without its seriously objectionable features in the welfare context. If a warrant could be obtained (the plaintiff affords us little help as to how it would be obtained), it presumably could be applied for ex parte, its execution would require no notice, it would justify entry by force, and its hours for execution would not be so limited as those prescribed for home visitation. The warrant necessarily would imply conduct either criminal or out of compliance with an asserted governing standard. Of course, the force behind the warrant argument, welcome to the one asserting it, is the fact that it would have to rest upon probable cause, and probable cause in the welfare context, as Mrs. James concedes, requires

> more than the mere need of the caseworker to see the child in the home and to have assurance that the child is there and is receiving the benefit of the aid that has been authorized for it. In this setting the warrant argument is out of place.

400 U.S. at 323-24.

A. There Is No Conflict Among The Courts of Appeal.

Petitioners' assertion that this Court should grant certiorari because *Wyman*'s status has created a conflict among the courts of appeals is mistaken. *Wyman* was decided in 1971. In the thirty-six years since the *Wyman* decision, only one other court of appeals has applied *Wyman* in the context of a home visit program used to confirm eligibility for government benefits. Twelve years ago, the Seventh Circuit upheld the home visit program at issue in that case on the same grounds as the Ninth Circuit upheld the home visit program in this case -- the home visits are not Fourth Amendment searches and even if they were, they are reasonable. *S.L. v. Whitburn*, 67 F.3d 1299.[8]

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[8] Petitioners also cite a twenty-eight year old decision from a district judge in Minnesota. *Reyes v. Edmunds*, 472 F. Supp. 1218, 1224 (D. Minn. 1979). In *Reyes*, the district judge stated that "[t]he majority opinion in *Wyman v. James* is not without conceptual problems, and, in view of the vigorous, persuasive three-judge dissenting opinions, the holding must be restricted

(Continued on following page)

Petitioners' contention that the Ninth Circuit's decision in this case conflicts with the Seventh Circuit's decision in *Whitburn* is simply wrong. In *Whitburn*, the plaintiffs challenged a home visit program instituted by Milwaukee County, in Wisconsin. In Milwaukee County, a "caseworker" reviews a completed application for welfare benefits and interviews the applicant. "The application is then subject to verification to ensure that the information provided is accurate and that the applicant is eligible for public assistance." *Id.* at 1302. "[I]f the information provided to a caseworker is insufficient to verify eligibility, or if

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to the boundaries imposed by the facts to avoid glaring inconsistency with prior search and seizure cases." 472 F. Supp. at 1224 (citing *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. Seattle*, 387 U.S. 541 (1967)).

It is clear from the district judge's statement that he believed the dissent, and not the majority, had correctly decided *Wyman* and he declined to follow this Court's decision. District judges, however, do not have the authority to ignore binding Supreme Court precedent. *Hubbard v. United States*, 514 U.S. 695, 713 n.13 (1995).

Moreover, the Court in *Wyman* distinguished both *Camara* and *See* finding no "glaring inconsistencies" with its holding. 400 U.S. at 325. The *Wyman* court held that *Camara* and *See* were not inconsistent because Mrs. James was not prosecuted for refusing to allow the home visit, her welfare benefits were merely terminated. *Id.*

Petitioners state that "[t]he Minnesota federal district also has invalidated a welfare home-visit program under the Fourth Amendment, using the same reasoning as the Seventh Circuit in *Whitburn*." (Petition, at 17-18, n.12.) In *Whitburn*, however, the Seventh Circuit ***upheld*** the home visit program against the Fourth Amendment challenge.

a caseworker believes that an applicant may not be eligible for benefits, then the case is designated for verification." *Id.* Verification is done by an "investigative service" hired by the County. Verification could include a home visit.

Milwaukee County does not obtain a search warrant for the home visits. The home visits are conducted between 8:00 a.m. and 8:00 p.m. (normally during business hours except under special circumstances). "The County does not contact the applicant to schedule the exact date or approximate time of the visit." *Id.* The field representative asks for permission to enter the residence and cannot enter the residence unless the applicant gives permission. Once inside, the field representative can note anything in plain view and pertinent to eligibility. Field representatives can "ask for permission to inspect closets, cabinets, attics, basements, garages, etc., but they are forbidden to inspect these areas without the resident's consent." *Id.*

The Seventh Circuit held, among other things, that the home visits did not violate the applicants' Fourth Amendment rights. The court initially held that it was bound by *Wyman* and the home visits were not searches for the same reasons articulated by this Court in *Wyman*. *Id.* at 1307 ("*Wyman* dictates that the home visits at issue are not searches within the meaning of the Fourth Amendment.") Further, the Seventh Circuit found that the home visits were not unreasonable, even if they were searches. The Seventh Circuit emphasized that while not all of the

factors discussed by the Court in *Wyman* were present in *Whitburn*, most of the factors were present and under *Wyman* the home visits were not unreasonable. *Id.* at 1308-09. Finally, the Seventh Circuit applied this Court's "special needs" cases and indicated that those cases supported its determination that if the home visits were searches, they are reasonable, and no warrant was required. *Id.* at 1310.

Petitioners assert that the Seventh Circuit upheld the home visit program in *Whitburn* "only on the ground that the home inspections were not mandatory, in that . . . 'benefits are not denied or cut off because the applicant has refused to allow the home visit.'" (Petition, at 17) (*quoting Whitburn*, 67 F.3d at 1307). Since the Seventh Circuit expressly stated that it was bound by *Wyman* and followed that decision, it is clear that it would not have struck down the home visit program if benefits were denied or cut off because an applicant refused to allow a home visit. This is true because in *Wyman* the Court explained that "[t]he visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be." 400 U.S. at 317-18. The Court therefore concluded that even if aid is denied for failure to consent to a home visit, the home visit does not violate the Fourth Amendment.

In *Whitburn*, the Seventh Circuit obviously did not conclude, contrary to *Wyman*, that a home visit

would violate the Fourth Amendment if benefits were denied as a result of an applicant's refusal to allow a home visit. The Seventh Circuit merely noted that this was an additional factor proving that the program did not violate the Fourth Amendment. The Ninth Circuit did not believe that *Whitburn* conflicted with its decision – it relied on *Whitburn* in upholding the County's home visit program. *Sanchez*, 464 F.3d at 921 n.6.

Accordingly, this Court does not need to expend its limited resources to address an area of Fourth Amendment law that rarely arises and where the courts of appeals have reached consistent decisions.

B. Searches Made For Purposes Of Investigating Child Abuse Are Different From The Project 100% Home Visits.

Recognizing that (a) only two courts of appeals decisions have applied *Wyman* in the context of home visits used to confirm eligibility for welfare benefits in the past thirty-six years and (b) that the two courts of appeals decisions are consistent, petitioners try to create a conflict by lumping all "home entries by government officials in the social-services context" together. This approach is unavailing.

Petitioners cite six cases in support of their "conflict" argument that all involve entry into the home for the purpose of investigating allegations of child abuse or to remove a child from the custody of his or her guardian. In none of the cases where

Fourth Amendment violations were found was entry into the home done with consent. Police officers accompanied the social workers in five of the cases. *Calabretta v. Floyd*, 189 F.3d 808, 811 (9th Cir. 1999); *Good v. Dauphin County Social Services*, 891 F.2d 1087, 1089 (3d Cir. 1989); *Lenz v. Winburn*, 51 F.3d 1540, 1543 (11th Cir. 1995); *Roska v. Peterson*, 328 F.3d 1230, 1238 (10th Cir. 2003); *Wildauer v. Rederick County*, 993 F.2d 369, 371 (4th Cir. 1993). In two of the cases the children were strip searched. *Calabretta*, 189 F.3d at 811-12; *Roe v. Texas Department of Protective and Regulatory Services*, 299 F.3d 395, 399 (9th Cir. 2002). In one case a child was strip searched and a body cavity search was also performed. *Roe*, 299 F.3d at 399. In only three of the cases did the courts of appeals even cite *Wyman*. *Roe*, 299 F.3d at 405-06; *Calabretta*, 189 F.3d at 816; *Wildauer*, 993 F.2d at 372.

None of the cited cases involved a systematic program applied to all applicants to confirm eligibility for welfare benefits. Rather, these cases involve entry into the home for purposes of investigating individualized allegations of child abuse. Therefore, these cases are readily distinguishable from *Wyman* and the principles announced in *Wyman* are not applicable.

For instance, in *Roska*, the Tenth Circuit recognized that in "special needs" cases "the nature of the need addressed makes particularized suspicion impossible or otherwise renders the warrant requirement impractical." 328 F.3d at 1241. However,

the Court noted that "individualized suspicion is at heart of a removal of a child from a home, distinguishing the instant case from the various drug testing cases [involving 'special needs'] that have been addressed by the Court." *Id.* at 1242. Similarly, in *Roe*, the Fifth Circuit distinguished *Wyman* on the ground that "[a]*ll* AFDC recipients had to endure visitation; the government did not single out individual recipients based on potential criminal liability." 299 F.3d at 405 (emphasis in original).[9]

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[9] In *Calabretta*, Judge Kleinfeld, writing for the Ninth Circuit, stated that *Wyman* "holds that the state may terminate welfare where a mother refuses to allow a social worker to visit her home to see whether the welfare money is being used in the best interests of the child for whom it is being paid." 189 F. 3d at 816. Judge Kleinfeld distinguished *Wyman* because in that case entry into the home was not "forced or compelled" whereas in *Calabretta* it was. In this case, the Ninth Circuit correctly recognized that "[a]s in *Wyman*, the home visits are conducted with the applicant's consent, and if consent is denied, the visit will not occur." *Sanchez*, 464 F.3d at 921.

Petitioners state that in *Calabretta* the Ninth Circuit concluded that, contrary to *Wyman*, entry into the home is not "consensual" if refusal to consent to the entry results in the loss of benefits. (Petition, at 19.) This statement is false. In *Calabretta*, the Ninth Circuit specifically recognized that under *Wyman*, "the state may terminate welfare where a mother refuses to allow a social worker to visit her home. . . . " 189 F.3d at 816.

Further, Judge Kleinfeld was in the panel majority in this case and felt no need to even mention the *Calabretta* decision. Thus, there is obviously no conflict within the Ninth Circuit's opinions on these Fourth Amendment issues as petitioners assert.

Systematic home visits for the purpose of confirming eligibility for benefits fit squarely within the rubric of this Court's special needs cases and *Wyman* itself. Cases involving individualized suspicion of child abuse are different from the type of home visits considered in *Wyman* where there was no individualized suspicion of wrongdoing. Thus, granting certiorari in this case would not assist the lower courts in determining the proper standards that apply to home searches done for the purpose of investigating alleged child abuse.

C. The Status Of *Wyman's* Initial Holding Does Not Warrant Consideration By This Court.

Petitioners also assert that certiorari should be granted because it is uncertain from subsequent decisions of this Court whether the *Wyman* court's initial holding that the home visits were not searches within the meaning of the Fourth Amendment is still good law. Since only two courts of appeals decisions in the past thirty-six years have addressed this particular issue, it is hardly a pressing one that requires this Court's attention.

This is particularly true in light of *Wyman's* alternative holding that even if the home visits were Fourth Amendment searches, the searches were reasonable. The Court employed an analysis that is very similar to "special needs" test that this Court has subsequently employed. In *Wyman*, the Court explained that the home visit "is not a criminal

investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding." 400 U.S. at 323. The Court also discussed in detail why requiring a government entity to obtain a warrant for a welfare home visit would be impractical. *Id.* at 323-24. Thus, *Wyman* fits within this Court's later developed special needs cases. *Griffin*, 483 U.S. at 873 ("Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be), we have permitted exceptions when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.") (citations and internal quotation marks omitted). Indeed, lower courts have cited *Wyman* as being a special needs case. *Roe*, 299 F.3d at 405 (analyzing *Wyman* as one of "the Court's two cases applying the 'special needs' doctrine to investigative home searches"); *McCabe v. Life-Line Ambulance Serv.*, 77 F.3d 540, 545 (1st Cir. 1996).

A court considering the constitutionality of a home visit program is highly unlikely to end its analysis by concluding that a home visit is not a search within the meaning of the Fourth Amendment. Rather, a court will do what the Ninth Circuit did here and what the Seventh Circuit did in *Whitburn* – consider whether the home visits are reasonable if they are Fourth Amendment searches. When resolving this question, courts will also do what the Ninth Circuit did here and what the Seventh Circuit did in

Whitburn – consider whether the searches qualify under this Court's special needs cases. Accordingly, even if the portion of the *Wyman* decision holding that home visits do not implicate the Fourth Amendment is not good law, there is virtually no chance that a lower court will reach a conclusion that is inconsistent with *Wyman* or the Court's other Fourth Amendment cases.

II

THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT THIS CASE IS GOVERNED BY *WYMAN*

Finally, petitioners ask the Court to grant certiorari because they assert that the County's home visits are distinguishable from the home visits at issue in *Wyman*. Since the Ninth Circuit's decision does not conflict with *Wyman*, this not an appropriate ground for granting certiorari. Rule 10 of the Rules of the United States Supreme Court. Indeed, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." *Id.* Moreover, the premise of petitioners' argument is wrong. The County's home visits are not distinguishable from the home visits that the Court considered in *Wyman*.

A. The Purpose Of The Home Visits Is To Confirm Benefit Eligibility.

Petitioners assert that "[t]he express purpose of [the home visits] is to uncover evidence of fraud in connection with the welfare application. In addition, should they find it, 'the investigators are required to report evidence of potential criminal wrongdoing for further investigation and prosecution.'" (Petition, at 5) (citations omitted). Petitioners assert that this "fact" distinguishes this case from *Wyman*. Petitioners are incorrect because they have misstated the record.

The purpose of the County's home visit program is to confirm that applicants are eligible for benefits, not to detect fraud. (ER 81 Ex. 7 at 19:8-11 (Crosby Depo.)). Moreover, the record shows that if an investigator believes that an applicant has committed welfare fraud in connection with the application, the investigator will ***not*** refer the matter for criminal investigation or prosecution. (ER 81 Ex. 43 at 89:4-10 (Reid Depo.)). Indeed, it is undisputed that no applicant has been prosecuted for welfare fraud based upon anything observed or discovered during a home visit that contradicted information provided by the applicant in the application or otherwise. (ER 81 Ex. 43 at 89:4-10, 157:1-4, 177:12-25, 191:20-192:6 (Reid Depo.)). The Ninth Circuit correctly determined that "[t]here is no evidence . . . that applicants have ever been prosecuted for welfare fraud as a result of inconsistencies discovered during the home visit, ***supporting a conclusion that the visits are***

intended, and in fact used, only as an eligibility verification tool." *Sanchez*, 464 F.3d at 924 n.12 (emphasis added).

It is true that if an investigator observes illegal substances such as drugs during a home visit, she may report this to the Child Protective Services, who will take whatever action they deem appropriate. (ER 81 Ex. 41 at 106:22-107:1). Similarly, if the home visit reveals information that an applicant may have received CalWORKs benefits in the past for which the applicant was not entitled, this information may lead to a subsequent investigation. (ER 81 Ex. 42 at 75:18-76:5 (Reid Depo.), Ex. 42 at 105:4-12 (Duvall Depo.), Ex. 42 at 115:13-19 (Crosby Depo.)).

However, this does not mean that the purpose of the home visits is to aid in criminal enforcement. As this Court recognized in *Wyman*, "[i]f the visitation serves to discourage misrepresentation or fraud, such a byproduct of that visit does not impress upon the visit itself a dominant criminal investigative aspect." 400 U.S. at 323. Similarly, the Court stated that "[i]f the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow . . . that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct." *Id.* (footnote omitted).

Accordingly, the purpose of the County's home visit program is to confirm eligibility for benefits, not

to investigate fraud or other alleged criminal violations. Therefore, *Wyman* cannot be distinguished on this ground.

B. The Home Visits Are Not Coerced.

Petitioners also argue that unlike *Wyman*, the home visits at issue here are coerced. According to petitioners, "it is difficult to imagine a more coercive situation than the one created by Project 100%" because if consent is not given for a home visit, the applicant will not receive benefits. (Petition, at 19.) Petitioners are simply wrong. As noted above, in *Wyman*, this Court stated that "the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. ***The aid then never begins or merely ceases, as the case may be.***" 400 U.S. at 317-18) (emphasis added).

The fact that benefits will not begin if an applicant does not consent to a home visit does not make the home visit coerced in violation of *Wyman*.

C. The Investigators Are Not Police Or Uniformed Authority.

Petitioners also attempt to distinguish *Wyman* on the ground that the individuals making the home visits in that case were caseworkers, while plaintiffs

characterize the County's investigators as "sworn peace officers" and "law-enforcement officers."

One factor in this Court's holding in *Wyman* that the home visits were reasonable searches (the Court assumed for the sake of argument that they were searches) was that the individuals conducting the home visits were not "police or uniformed authority." *Id.* at 322. The fact that that the home visits were made by caseworkers, as opposed to some other non-police, non-uniformed authority, was not germane.

The County investigators, like the caseworkers in *Wyman*, have virtually none of the trappings, powers or job responsibilities as traditional law enforcement officers or police. The investigators do not wear uniforms, do not carry weapons of any kind, and do not have the power to arrest anyone because they have not been given that power by the D.A.'s Office. (ER 81 Ex. 10 at 1 (memo), Ex. 10 at 15:12-15 (Crosby Depo.), Ex. 10 at 58:17-19 (Bogard Depo.); ER 79 at 2, ¶ 6 (Crosby Decl.)).

Indeed, this Court rejected the distinction petitioners advance in *New York v. Burger*, 482 U.S. 691 (1987). In that case, the Court upheld the warrantless inspection of a vehicle-dismantling business by uniformed police officers, finding no significance to the fact that police officers, not administrative agents, conducted the inspection:

> [W]e fail to see any constitutional significance in the fact that police officers, rather than "administrative" agents, are permitted

> to conduct the [] inspection. The significance respondent alleges lies in the role of police officers as enforcers of the penal laws and in the officers' power to arrest for offenses other than violations of the administrative scheme. It is, however, important to note that state police officers, like those in New York, have numerous duties in addition to those associated with traditional police work. . . . So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself.

Id. at 717.

For these reasons, *Wyman* cannot be distinguished on the ground that the County uses investigators to perform the home visits.

D. Rehabilitation Was Not The Primary Purpose Of The Home Visits In *Wyman*.

Next, petitioners assert that the home visits at issue in *Wyman* are different from the home visits in this case because the *Wyman* home visits were purely rehabilitative and involved only "in-home counseling by a social worker at the kitchen table or in the living room." (Petition, at 18.) It is apparent, however, that the primary purpose of the home visits at issue in *Wyman* was to confirm eligibility for benefits – not to provide "rehabilitation." In the lower court, New York asserted that "the home visit is neither a search nor a

seizure, but is merely ***designed to verify information as to eligibility for public assistance*** and is thus reasonably related to a valid governmental policy. . . . " *James v. Goldberg*, 303 F. Supp. 935 at 939 (1969) (emphasis added). This is the same primary purpose as the Project 100% home visits. New York also argued that "since the receipt of public assistance is a privilege, plaintiff is obligated to provide necessary information so that this privilege can be recognized and implemented. . . . " *Id.* (citation and footnote omitted).

The Court also noted that New York had a "paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." *Wyman,* 400 U.S. at 319. The Court indicated that the public had a strong interest in knowing that its funds are being used properly. The Court likened the home visits to the situation "where an Internal Revenue agent, in making a routine civil audit of a taxpayer's income tax return, asks that the taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax." *Id.* at 324. These statements relate to the eligibility confirmation component of the home visits and demonstrate that this Court understood that this was their primary purpose.

Petitioners' contention is also inconsistent with how the dissent viewed New York's home visit program. According to the dissent "the welfare visit is

not some sort of purely benevolent inspection." *Id.* at 339 (Brennan, J., dissenting). Justice Brennan also noted that "[t]ime and again, in briefs and at oral argument, appellants emphasized the need to enter AFDC homes to guard against welfare fraud and child abuse, both of which are felonies." *Id.* (footnote omitted). New York also "emphasized the importance of the visit to provide evidence leading to civil forfeitures including elimination of benefits and loss of child custody." *Id.* at 340.

Thus, both the home visits at issue in *Wyman* and the Project 100% home visits share the same primary purpose – to confirm that the applicant is eligible for welfare benefits. Thus, the Ninth Circuit properly concluded that "on *Wyman's* first holding [that the home visits are not Fourth Amendment searches], there is no greater showing of rehabilitative purpose than there is in this case." *Sanchez*, 464 F.3d at 921 n.6. "[T]he search in *Wyman* had no more of a rehabilitative purpose than the search here." *Id.* at n.7.

The Ninth Circuit also properly concluded that "whether the home visits serve a rehabilitative purpose is not the determinative inquiry under *Wyman*. . . . [T]his factor is relevant insofar as it indicates that the home visits are not intended as searches conducted in furtherance of a criminal investigation." *Id.* In this case, the home visits are used to confirm eligibility for benefits, not to further a criminal investigation.

For these reasons, petitioners' attempt to distinguish *Wyman* on this ground fails.

E. The Home Visits Are Needed To Confirm Benefit Eligibility.

Citing a law review article, petitioners contend that "[e]xperience shows that computer-matching systems are both more likely to uncover fraud and far less intrusive on personal privacy." (Petition, at 19.) Thus, petitioners contend that the home visits are not needed. However, petitioners own experts admitted that the available electronic databases are often out-of-date and have incomplete information. (Supp. ER Ex. 2 at 20:13-25, 21:24-22:24, 23:23-25:4, 25:24-26:7, 27:8-11, 29:2-31:13 (Shapiro Depo.)).[10] Thus, computer-matching systems are not reliable substitutes for home visits.

Further, in *Wyman*, the Supreme Court stressed that secondary sources such as leases, birth certificates, or interviews with school personnel, "might be helpful, [but] they would not always assure verification of actual residence or of actual physical presence in the home, which are requisites for AFDC benefits. . . ." 400 U.S. at 322 (footnote omitted). The admissions of plaintiffs' experts likewise establish that computer databases would not always assure actual residence or physical presence in the home.

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[10] "Supp. ER" refers to the Supplemental Excerpts of Record the County filed in the Ninth Circuit.

Moreover, this Court "has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means, because the logic of such elaborate ***less-restrictive-alternative*** arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Board Of Education v. Earls*, 536 U.S. 822, 837 (2002) (emphasis added; internal citations, quotation marks omitted).

For these reasons, *Wyman* cannot be distinguished on this ground.

F. No Serious Welfare Fraud Problem Is Necessary For The Existence Of A Home Visits Program.

Petitioners also assert that a "serious welfare-fraud problem" is needed to justify the County's home visit program. (Petition, at 19.) However, no case establishes that a serious welfare fraud problem is needed before a government may implement a home visit program. There was no evidence introduced in *Wyman* indicating that New York had a serious welfare fraud problem. Nonetheless, the home visits were upheld in that case.

The evidence does establish, however, that the home visit program has been successful. For the roughly five-year period before and after Project 100% was implemented, the overall denial rate increased from 40.6% to 47.7%. (ER 92 at 2, ¶ 8 (Vukotich Decl.)). Seven percent is a significant increase. When

withdrawals[11] are added to denials the increase is even more dramatic, from 47.1% to 58.4% – more than 11%. (*Id.*)

Moreover, statistics comparing denial rates before and after Project 100% will never tell the whole story because they do not capture the program's deterrent effect. People who are not eligible for CalWORKs benefits and decide not to apply for those benefits after learning of Project 100% will not be reflected in those statistics. Thus, the public benefit of Project 100% cannot be demonstrated by statistics alone.

Indeed, the public benefits even if the home visit reveals that an applicant is eligible for CalWORKs benefits. The taxpayers are entitled to assurance that their money is being well spent and can take comfort in the fact that only those who are eligible for benefits are receiving them.

The County's home visits program has been successful and no serious welfare fraud problem is needed to justify a home visit program.

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[11] When ineligible applicants learn of the home visit at the initial interview with the ET, they may choose to withdraw their application. (ER 92 at 2, ¶ 9 (Vukotich Decl.)).

G. The Ninth Circuit Did Not Endorse A Home Visit Program For Taxpayers.

Based on Judge Fisher's dissenting opinion, petitioners assert that the Ninth Circuit's interpretation of *Wyman* could be used to justify visits to the homes of other recipients of government aid programs such as Medicare or Social Security. In addition, petitioners assert that, "the reading of *Wyman* endorsed by the panel below would permit agents of the Internal Revenue Service to enter and search the home of any person claiming a dependent as a tax deduction, in order to verify the claim." (Petition, at 20.) Petitioners are wrong. Under the CalWORKs program "eligibility depends, in part, upon a person's physical residence in the state and actual presence at the place designated as their residence. . . . " *Sanchez*, 464 F.3d at 927. Further, an applicant may not be eligible for benefits if a claimed "absent" parent is actually living in the home. (ER 81 Ex. 8 (Eligibility Factors)).

For programs such as Medicare and Social Security, eligibility depends entirely on age and prior work credits.[12] There would be no need and therefore no justification for home visits to determine eligibility for those benefit programs because, unlike CalWORKs benefits, presence in a particular state or the

[12] Judge Fisher also mentioned veteran's benefits in his dissent. Eligibility for such benefits depends on prior military service, not physical presence in a state.

United States is not a requirement to receive those benefits. Similarly, it is not necessary for a dependent to reside in the home for a person to able to claim the dependent as a tax deduction. Thus, there would be no reason to use a home visit to confirm that a dependent deduction was properly claimed.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ or Certiorari should be denied.

DATED: October 17, 2007

Respectfully submitted,

JOHN J. SANSONE, County Counsel
COUNTY OF SAN DIEGO
THOMAS D. BUNTON, Senior Deputy*
1600 Pacific Highway, Room 355
San Diego, California 92101-2469
(619) 531-6456
Attorneys for Respondents

**Counsel of Record*

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IN THE

Supreme Court of the United States

ROCIO SANCHEZ, OLGA CASTRO, MYRNA MARTINEZ, KAREN BJORLAND, CHERYL MACLYMAN, AND RHONDA KERN,
Petitioners,

v.

COUNTY OF SAN DIEGO, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

ERIC ALAN ISAACSON
BONNY E. SWEENEY
AMBER L. ECK
COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
655 West Broadway, Suite 1900
San Diego, California 92101
(619) 231-1058

WALTER DELLINGER
(*Counsel of Record*)
PAMELA HARRIS
PAMMELA QUINN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

DAVID BLAIR-LOY
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
450 B Street, Suite 1420
San Diego, California 92101
(619) 232-2121

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Attorneys for Petitioners

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STATUTE

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REPLY BRIEF FOR THE PETITIONERS

As petitioners demonstrated in their opening brief, the uncertain status of this Court's decision in *Wyman v. James*, 400 U.S. 309 (1971), has created a deep and longstanding circuit-court conflict over the Fourth Amendment standard governing home entries by social-services officials. That split has been expressly recognized by at least one court of appeals. *See Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 401 & n.4 (5th Cir. 2002) ("Selecting the applicable test for a social worker's investigative home visit would be a question of first impression in this circuit—an issue over which other courts of appeals have divided."). Respondents do not—and cannot plausibly—deny the existence of this conflict, and they offer no persuasive reason why it does not merit the Court's review.

1. Petitioners have shown already that *Wyman*'s first and principal holding—that a governmental entry into the private home of a welfare recipient does not constitute a "search" under the Fourth Amendment because it occurs outside "the traditional criminal law context"—has been undermined badly, if not outright superseded, by more recent decisions of this Court. Pet. 10-17. Respondents do not even attempt to argue otherwise, tacitly conceding that *Wyman* cannot be reconciled with more contemporary Fourth Amendment precedent. Instead, respondents argue that there is no need for this Court to resolve definitively the question of *Wyman*'s status and the conflict it has generated. That argument is wholly without merit.

a. Respondents argue that there is no "pressing" need to clarify the status of *Wyman* because that decision has been implicated directly in only two court of appeals' cases. (Opp. 23.) That is simply not so.

As respondents acknowledge, two courts of appeals—the court below and the Seventh Circuit, *see S.L. v. Whitburn*, 67

F.3d 1299, 1306-07 (1995)—have relied expressly on *Wyman* in evaluating the constitutionality of welfare-verification home entries. But as is discussed at length in petitioners' opening brief, many other courts of appeals have cited and relied on *Wyman*, as well, in cases involving social-services home entries outside the welfare context. *See, e.g., Roe*, 299 F.3d at 405 (Fifth Circuit); *Wildauer v. Frederick County*, 993 F.2d 369, 372 (4th Cir. 1993); *Calabretta v. Floyd*, 189 F.3d 808, 816 (9th Cir. 1999).

It is true, as respondents note, Opp. 21, that not all courts of appeals apply *Wyman* in similar circumstances. But that only underscores the uncertain status of *Wyman*. It is precisely because some courts appear to have concluded that *Wyman* is no longer good law while others continue to treat *Wyman* as governing precedent that this Court's intervention is necessary.

That *Wyman* is the source of substantial lower court confusion is undeniable. That confusion should be resolved. The Court could hardly find a better vehicle for reexamining *Wyman* than a case in which the court of appeals held it to be controlling on similar facts.

b. Respondents also argue that *Wyman* is properly understood to apply only in the welfare context. It follows, they suggest, that cases cited by petitioners that fall outside that context—categorized by respondents as "child abuse" cases (Opp. 20-23)—cannot be the basis of a meaningful circuit split. That, too, is incorrect.

First of all, respondents may well believe that *Wyman* has no application outside the welfare context. But the critical point here, which respondents cannot escape and do not even purport to address, is that the *courts of appeals* do not all agree that the matter is so clear-cut. As noted above, several courts of appeals have cited *Wyman* outside of the welfare context. *See, e.g., Wildauer*, 993 F.2d at 372. And those that do not cite it, perhaps because they agree with

respondents or because they believe it to be clear that *Wyman* is no longer valid, find themselves out of synch with other courts. *See, e.g.*, *Good v. Dauphin County Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1090 (3d Cir. 1989) (holding warrant requirement applicable to a social worker's investigative home visit). It is that confusion among the courts themselves—which persists despite respondents' certainty—that necessitates this Court's intervention.

In any event, respondents' confidence that *Wyman* could have no bearing on non-welfare cases is badly misplaced. The principal holding of *Wyman* is that the home entry in that case was not a search for Fourth Amendment purposes because it did not arise in "the traditional criminal law context." That holding is plainly implicated by *any* official home entry made in connection with a social-services program and outside the "criminal law context." Respondents' views notwithstanding, it is hardly surprising that so many lower courts have taken *Wyman* at its word and analyzed that case in connection with home entries undertaken in a variety of social-services contexts.

Nor is it true, as respondents suggest, that the factual circumstances presented by non-welfare cases are so different from those in welfare cases that the cases cannot be considered together for these purposes. First, though respondents label all of the non-welfare cases cited by petitioners as "child abuse" cases, those cases in fact involve many different factual predicates for home entries. *See, e.g.*, *Lenz v. Winburn*, 51 F.3d 1540, 1543-44 (11th Cir. 1995) (home entry by social worker to retrieve child's belongings from home of former custodial parent); *Roska v. Peterson*, 328 F.3d 1230, 1238-39 (10th Cir. 2003) (home entry by social worker to remove child from home). And some of those cases raise issues very similar to those presented in the welfare context. In *Wildauer*, 993 F.2d at 370-71, for instance, the Fourth Circuit considered an investigative home

visit designed to confirm the fitness of foster parents—persons who voluntarily agree to become foster parents and could avoid a home entry by forgoing that agreement.

In any event, whatever the precise scenario prompting a home entry, the *relevant* facts—a government official entering a private home for a purpose other than criminal law enforcement—are the same in all of these cases. It is that basic fact pattern, common to *all* of the cases cited by petitioners, that squarely raises the question dividing the lower courts: what threshold Fourth Amendment standard applies to a home entry by an official with a social-services rather than law-enforcement agenda, and is *Wyman* still controlling on that point?

c. Finally, respondents argue that there is no need to clarify the status of *Wyman*'s principal holding that a social-services home entry does not constitute a Fourth Amendment "search" because the lower courts can and do rely alternatively on *Wyman*'s secondary rationale: that even if such an entry is a "search," it is "reasonable" under the Fourth Amendment. Opp. 13-25. But the availability of an alternative ground for upholding suspicionless searches in the social-services context is no answer to the problems created by *Wyman*'s outdated holding.

First, there is no reason why a court should be required first to invoke a questionable precedent that, if valid, would decide the case before it, and then go on to justify that result by way of an entirely different and arguably superfluous rationale. Indeed, one of the functions of this Court's certiorari review is to resolve the doctrinal confusion that leads to just that kind of judicial inefficiency. That even respondents believe such a cumbersome and opaque method of adjudication is made necessary by *Wyman*'s uncertain status is itself a reason for this Court to grant review.

Second, the circuitous route prescribed by respondents works only in one direction: it allows a court to *uphold* a

home search undertaken in the social-services context. *Wyman*'s first holding—that a social-services home entry does not constitute a "search" at all—simply does not permit the opposite conclusion: that a social-services home entry *violates* the Fourth Amendment because it is "unreasonable" under *Wyman*'s alternative rationale. Put differently, a court cannot remain faithful to *Wyman*'s first holding and also invalidate a suspicionless social-services home entry. There is thus no way to avoid the necessity for a definitive ruling on whether *Wyman* remains good law.

2. Respondents devote a substantial portion of their brief to arguing that the decision below is consistent with *Wyman*'s alternative "reasonableness" rationale. Opp. 25-37. Petitioners already have catalogued the reasons why, even assuming that *Wyman*'s "reasonableness" analysis controls, the suspicionless home searches authorized by Project 100% could not survive review. Pet. 18-21. In particular, that the searches at issue here are conducted by agents of the District Attorney's office, rather than social workers, and specifically contemplate referrals for criminal prosecution—facts that respondents seek to minimize, Opp. 27, 29, but cannot deny—brings this case outside *Wyman*'s secondary "reasonableness" rationale. *See* Pet. 18.

Notably, respondents limit their merits argument to *Wyman*, and do not even attempt to justify the outcome below under any more contemporary Fourth Amendment standard, such as the "special needs" exception to the warrant requirement. Nor could they. We do not agree with respondents, for instance, that under *Wyman*, a home-entry welfare-verification program need not be justified by an actual welfare fraud problem. *See* Opp. 34. But whatever the correct answer under *Wyman*, it is abundantly clear that under the modern special needs exception, a regime of suspicionless searches must indeed be designed to address an actual and serious problem. *See, e.g., Chandler v. Miller*,

520 U.S. 305, 318-19 (1997) (invalidating random drug-testing of political candidates under "special needs" standard for lack of a "demonstrated problem of drug abuse"). And respondents are unable to point to any substantial welfare-fraud problem to which Project 100% responds. Similarly, respondents argue that under *Wyman*, whether a home search is conducted by a social worker or a law-enforcement agent is not "germane." Opp. 29. That is not a fair reading of *Wyman*. But more important here, whatever the weight to be assigned that factor under *Wyman*'s amorphous "reasonableness" calculus, it is plain beyond dispute that application of the special needs standard turns critically on the degree of law-enforcement involvement in a general search program. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001) (refusing to apply "special needs" exception to warrant requirement to program with significant law-enforcement involvement and purpose).

Elsewhere in their brief, respondents suggest that *Wyman*'s continued application by some (though not all) of the lower courts presents no urgent problem because the secondary, "reasonableness" rationale of that case is not meaningfully different from the "special needs" standard since established by this Court. Opp. 24. But respondents' own defense of Project 100% shows that this is not true. In many respects, including those identified above, the special needs standard is substantially more demanding than *Wyman*'s multi-factored "reasonableness" analysis—certainly as that analysis is understood by respondents. By defending Project 100% only under *Wyman*, respondents tacitly concede that *Wyman*'s continued validity is crucial to their case. And to the precise extent that they are right, their argument demonstrates the compelling need for this Court to clarify whether *Wyman* does in fact remain governing law.

3. In their opening brief, petitioners demonstrated that the reasoning of the opinion below is broad enough to allow

for a wide range of highly intrusive, suspicionless home searches. Read most broadly, the Ninth Circuit's reliance on *Wyman*'s first holding would bring an entire category of non-law-enforcement home entries outside the purview of the Fourth Amendment altogether. And even read more narrowly, the decision below seems clearly to approve as "reasonable" any suspicionless home search that is conducted in order to verify eligibility for a governmental benefit. Pet. 20-21.

Respondents do not attempt to argue otherwise, and they identify no limiting principle in the opinion below that would preclude additional eligibility-verification home searches. Instead, they reassure the Court that such searches will not occur because there is "no need" for home "visits" to determine eligibility for other government programs. Opp. 36-37. But that is entirely beside the point. The issue here is whether, assuming the government—unlike respondents—believes that searches *would* be useful in confirming eligibility for a program or benefit,[1] there is anything in the Fourth Amendment that would impose external limits on its ability to engage in a general program of suspicionless home searches. The decision below, and now respondents, provide no such constitutional stopping point. This Court should grant review to clarify that the government does not have unlimited authority to conduct suspicionless home searches in order to verify eligibility for governmental benefits.

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[1] Respondents' views about the need for such searches, though doubtlessly sincere, may not reflect the views of the government administrators who actually would make such decisions. For instance, it is true, as respondents note, that it is not necessary for a dependent to reside in the home of a person claiming that dependent as a tax deduction. Opp. 37. But that does not mean that the IRS could not plausibly decide that it would be useful to use a home visit to confirm that, say, an eight-year-old claimed as a "qualifying child" dependent—who is required by the IRS to have, *inter alia*, "the same principal place of abode as the taxpayer for more than one-half of [the] taxable year," 26 U.S.C. § 152(c)(1)(B)—actually meets the statutory definition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIC ALAN ISAACSON
BONNY E. SWEENEY
AMBER L. ECK
COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
655 West Broadway, Suite 1900
San Diego, California 92101
(619) 231-1058

WALTER DELLINGER
(*Counsel of Record*)
PAMELA HARRIS
PAMMELA QUINN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

DAVID BLAIR-LOY
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
450 B Street, Suite 1420
San Diego, California 92101
(619) 232-2121

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Attorneys for Petitioners

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